SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 240.

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

TOMMY PAYNE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Names and Addresses of Counsel.

THOS. P. REVELLE,
U. S. District Attorney,
Federal Building, Seattle, Washington,
W. W. MOUNT,
Assistant U. S. Attorney,
Federal Building, Tacoma, Washington,
Attorneys for Appellant.
ARTHUR E. GRIFFIN,
1219–21 Alaska Building, Seattle, Washington,
ARTHUR R. GRIFFIN,
1219–21 Alaska Building, Seattle, Washington,
Attorneys for Appellee. [1*]

In the United States District Court, for the Western District of Washington, Southern Division.

No. 111–E.

TOMMY PAYNE,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Bill of Complaint—Petition.

To the Honorable Judges of the Above-entitled Court, Sitting in Equity.

The plaintiff complains of the defendant and for cause of action alleges and says:

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*Page-number appearing at foot of page of original certified Transcript of Record.

I.

That the plaintiff is and at all times since his birth has been a full blood Indian, residing upon the Quileute Reservation in this District, and a member of the Quileute Tribe of Indians.

II.

That the grounds upon which the court's jurisdiction depends are as follows: That the plaintiff is a full blood Quileute Indian and a member of the Quileute Tribe of Indians, born and residing upon the Quileute Reservation in this District. That the plaintiff is entitled under the treaty made and entered into between the United States and the Quileute Indians and other bands of Indians, and under the Allotting Acts of the United States to an allotment of at least 80 acres of land upon the Quinaielt Reservation in the State of Washington, and within this District. The jurisdiction of the court further depends upon the acts of August 15, 1894, 28 Statutes at Large 305, and is amended by the [2] act of February 6, 1901, 31 Statutes at Large 760, giving the right to Indians to bring suits against the United States to establish their rights to an allotment of land.

III.

That plaintiff is the head of the family consisting of the plaintiff's wife and three children.

IV.

That about nine years ago the plaintiff duly selected for allotment with the assistance and approval of the then allotting agent of defendant for

said Quinaielt Reservation, the following described land as his allotment, described as follows, to wit:

> M. 45, The West one-half (½) of the Northwest quarter (¼) of Section 26, Township 23, North of range 13 W., containing 80 acres, the same being a portion of the Quinaielt Reservation, within the District of Washington.

and that ever since said land was so selected by plaintiff, the plaintiff is informed and believes, that the same has been held for the plaintiff, and that all other persons and Indians have been excluded therefrom.

V.

That the land described is unalotted, unimproved, vacant, Indian lands subject to selection and allotment, under the laws of the United States and plaintiff is lawfully entitled to have said land allotted to him.

VII.

Notwithstanding all of the facts hereinbefore alleged the defendant, its officers and agents have wrongfully failed, neglected and refused to allot the said land to the plaintiff or to issue to the plaintiff any trust or fee patent therefor, and have denied and excluded and still deny and exclude plaintiff from [3] said land and have refused and still refuse to let plaintiff go upon or reside upon said land or any portion thereof.

VII.

That plaintiff is entitled to have said land so selected allotted to him and desires that the same be allotted to him and that his rights be recognized and

that he be permitted to go upon, live upon, cultivate and improve said land as his home.

VIII.

That plaintiff waives answer under oath.

WHEREFORE, plaintiff prays judgment as follows:

1. That a judgment and decree be entered herein as provided by law in favor of this claimant to said 80 acres of the said land hereinbefore described, and that said decree be properly certified by the Secretary of the Interior, and that the plaintiff be awarded said lands as his allotment and that he be adjudged and decreed to have full right, power and authority to go upon, live upon, cultivate and improve the said land as his home in all respects as provided by law.

2. That the plaintiff have all other and further relief as is equitable and just.

GRIFFIN & GRIFFIN,
Attorneys for Plaintiff. [4]

State of Washington,
County of King,—ss.

Tommy Payne, being first duly sworn, upon oath deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing petition, knows the contents thereof and the same is true as he verily believes.

[Thumb print] TOMMY PAYNE.

Subscribed and sworn to before me this 2d day of October, 1920.

[Notary Seal] ARTHUR E. GRIFFIN,
Notary Public in and for the State of Washington,
Residing at Seattle, Washington.

[Indorsed]: Filed in the United States District Court Western District of Washington, Southern Division. Oct. 29, 1920. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [5]

United States District Court Western District of Washington, Southern Division.

No. 111-E.

TOMMY PAYNE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Answer.

To the Honorable Edward E. Cushman, Judge of the Above-entitled Court, Sitting in Equity:

Comes now the above-named defendant, the United States of America, by Robt. C. Saunders, United States Attorney, for the Western District of Washington, and in answer to the petition of the plaintiff, Tommy Payne, in the above-entitled cause admits, denies and alleges as follows:

I.

Answering paragraphs I, II and III of said pe-

tition, this defendant, for lack of knowledge, information or belief as to the matters and things therein contained, denies the same and each and every allegation thereof.

II.

Answering paragraph IV of said petition, this defendant denies the same and each and every allegation thereof and alleges the facts to be that the land mentioned and described in said petition is not such land as is or would be available for agricultural or grazing purposes, but is heavily timbered and timbered to such an extent that the timber value thereof greatly exceeds the value of said land for agricultural or grazing purposes. [6]

III.

Answering paragraph VI of said petition this defendant denies the same and each and every allegation thereof, and alleges the facts to be that the said defendant rightfully refused to allot the said land to the plaintiff, or to issue to the plaintiff any trust or fee patent therefor, and has denied and excluded, and still denies and excludes the plaintiff from said land, and has refused and still refuses to let plaintiff go upon, or reside upon, said land, or any portion thereof.

IV.

Answering paragraph VII of said petition, this defendant denies the sam*d* and each and every allegation thereof.

WHEREFORE, this defendant prays that the plaintiff go hence, and that the defendant have judgment for its costs and disbursements, and for

such other and further relief as to this Honorable Court may appear just and equitable.

ROBT. C. SAUNDERS,
United States Attorney.
J. M. BOYLE, Jr.,
Assistant United States Attorney.

Received a copy of the within Answer this 28th day of March, 1921.

GRIFFIN & GRIFFIN,
Attorneys for Pltf.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Mar. 29, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [7]

In the United States District Court for the Western District of Washington, Southern Division.

No. 111–E.

TOMMY PAYNE,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Demurrer.

Comes now the plaintiff and demurs to the affirmative matter set forth and contained in the defendant's answer, for the reason and upon the ground that said affirmative matter in said answer does not state facts sufficient to constitute a defense,

and does not state facts sufficient to prevent the plaintiff from having and recovering the relief set forth and demanded in his complaint and petition herein.

GRIFFIN & GRIFFIN,
Attorneys for Plaintiff.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. July 15, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [8]

In the District Court of the United States Western District of Washington, Southern Division.

No. 111-E—IN EQUITY.

TOMMY PAYNE,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Filed: July 28, 1921.
GRIFFIN & GRIFFIN,
For Plaintiff,
Hon. ROBT. C. SAUNDERS,
United States Attorney,
Hon. J. M. BOYLE, Jr.,
Asst. United States Attorney,
For Defendant.

CUSHMAN, District Judge—Under the Act of August 15, 1894, (28 Stats. at L. Chap. 290, page

305,) as amended by the Act of February 6, 1901, (31 Stats. at L., chap. 217, page 760) (Comp. Stats. 4214), plaintiff, a full blooded Indian of the Quileute Tribe, the head of a family consisting of a wife and three children, sues for an allotment of eighty acres of land in the Quinaielt Reservation, which he alleges he selected nine years ago with the assistance and approval of the then allotting agent.

The defendant has answered, alleging, among other things:

> " * * * that the land mentioned and described in said petition is not such land as is or would be available for agricultural or grazing purposes, but is heavily timbered and timbered to such an extent that the timber value thereof greatly exceeds the value of said land for agricultural or grazing purposes."

A demurrer has been interposed to this defense by the plaintiff. [9]

The treaty with the Quileute and Quinaielt Indians, made July 1, 1855, provides:

> "Article 5. To enable the said Indians to remove to and settle upon such reservation as may be selected for them by the President, and to *clear*, fence, and break up a sufficient quantity of land for cultivation, the United States further agrees to pay the sum of two thousand five hundred dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

"Article 6. The President may hereafter, when in his opinion the interests of the Territory shall require, and the welfare of said Indians be promoted by it, remove them from said reservation or reservations to such other suitable place or places within said territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands, in which latter case the annuities, payable to the consolidated tribes respectively, shall also be consolidated; and he may further, at his discretion, cause the whole or any portion of the lands to be reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indians, and which they shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment made accordingly therefor." (12 Stats. 971.)

Article VI of the treaty with the Omahas, concluded at Washington City, March 6, 1854, above referred to, provides:

"The President may, from time to time, at his discretion, cause the whole or such portion of the land hereby reserved, as he may think proper, or of such other land as may be selected in lieu thereof, as provided for in Article first, to be surveyed into lots, and to assign to such Indian or Indians of said tribe as are willing to avail of the privilege, and who will locate on the same as a permanent home, if a single person over twenty-one years of age, one-eighth of a section; to each family of two, one-quarter section; to each family of three and not exceeding five, one-half section; to each family of six and not exceeding ten, one section; and to each family over ten in number, one-quarter section for every additional five members * * * (10 Stats. 1043). [10]

The Court will take judicial notice of the fact that the Quinaielt Reservation was at the time of the treaty and its establishment, a timbered area, and, save as since cleared, so remains. It is to be noted that Article V of the treaty with the Quileutes appropriated $2500 to be expended, in part, to "clear" land upon it for cultivation. This must have contemplated clearing it of timber.

Section 1 of the allotment act of February 8, 1887, as amended, provides:

"In all cases where any tribe or band of Indians has been or shall hereafter be located upon any reservation created for their use by

> treaty stipulation, Act of Congress, or executive order, the President shall be authorized to cause the same or any part thereof, to be surveyed or resurveyed whenever in his opinion such reservation or any part may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian. * * * (Sec. 4195 Comp. Stats.)

If the act is necessarily inconsistent with the treaty, it, to that extent, supersedes the treaty; but it is the duty of the Court to give full effect to both where it can reasonably be done. This is true in the case of statutes and, for stronger reasons, it must be true where a modification of a treaty is claimed to have been effected by a later statute, for a treaty is *quasi* contractual in its nature. Citation of authority upon these propositions is deemed unnecessary.

By this section, the discretion of the President or Secretary in the particular in question is limited to determining, before surveying a reservation or a part of it, that it "may be advantageously utilized for agricultural or grazing purposes by [11] such Indians." It is not claimed that the Reservation has not been surveyed, and from the complaint it

would appear that the portion of it now in question had been.

The right given the President and the duty outlined are controlled by the character of the land to be surveyed. The discretion vested in the President of allotting to the individual Indian lands "in such area as, in his opinion may be for their best advantage, not to exceed 80 acres, etc.," contemplates a discretion in determining the amounts to be allotted and places the limit on such amount, which is less than that provided by the treaty. While the foregoing authority is given the President to consider and determine the character of the land in fixing the size of the allotment, no right is given by this section to refuse an allotment of selected, surveyed land because the lands are more valuable for timber than agriculture or grazing.

In United States vs. Fairbanks (171 Fed. 337) the Circuit Court of Appeals of the Eighth Circuit in considering this provision, said:

> "the acts of 1887 and 1889 were confined to lands that were 'advantageous for agricultural and grazing purposes.' The department, in construing this language, ruled that lands which were chiefly valuable for the pine timber growing thereon, did not come within the statute. Such lands had therefore been excluded from allotment. The Steenerson act abrogated this limitation. The agent was not aware of this feature of the Steenerson act, and for that reason held that the Mooers application for the lands in question were valid, and permitted the second

filing. The trial court was also of the opinion that, inasmuch as the Steenerson act first gave a right to the allotment of pine lands all persons claiming such allotments should be treated alike, and that no allotment of such lands be made until the agency was ready to begin the work of making additional allotments under the Steenerson act. We think this ruling was erroneous. The regulation of the department excluding timber lands from the benefit of the statutes of 1887 and 1889 was itself questionable. A very [12] large portion of the area of the United States at the present time developed to agriculture was originally timber land. * * *

(Act p. 340)

Leecy vs. United States, 190 Fed. 289.

The Fairbanks case was affirmed by the Supreme Court (223 U. S. 315) without discussing the particular question here involved. The Steenerson act, spoken of by the courts has no application to the lands now in question.

The demurrer to this defense is sustained; but, on account of the broad denials of the answer, the demurrer to the answer as a whole is overruled.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jul. 20, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [13]

In the District Court of the United States, Western District of Washington, Southern Division.

No. 111-E—IN EQUITY.

TOMMY PAYNE,

Complainant,

vs.

UNITED STATES OF AMERICA,

Defendant.

Memorandum Decision on the Merits.

Filed: January 19, 1922.

GRIFFIN & GRIFFIN,
For Complainant,
Hon. THOS. P. REVELLE,
U. S. District Attorney,
Hon. W. W. MOUNT,
Assistant District Attorney,
For Defendant.

CUSHMAN, D. J.—The evidence taken and the arguments, oral and written, but confirmed my belief in the correctness of the ruling herein made upon the demurrer to the answer.

In 1885, the lands here in question, with other lands, were reserved for the Indians of the Quinaielt and Quileute Tribes, with provision and promise made for their allotment. The Indians were, in effect, told that the Government thought it best to allot the lands in severalty that they might have homes and better learn to cultivate the soil.

To carry out this beneficent purpose, in exchange for a vast and rich heritage of lands released by the Indians, the Government reserved for them a small parcel of land in a remote wilderness. It was covered with timber, which was then valueless. [14] The land, itself, was not rich, but rough, stony and of a light soil at the best. The timber being of no value, and the lands of little worth, there was no way to defray the expense of clearing the land, which, with timber such as that upon the land, is very heavy.

The opportunity of taking fish from the ocean, afforded by the location, was, probably, all that enabled the Indians to exist near this "cod's head" that had been so generously given them for the "salmon's tail."

Now, after nearly seventy years, when all who heard Governor Stevens make these promises are dead, because, forsooth, the timber on an allotment has become of sufficient value to enable the descendants of the credulous ones, who listened to those ancient tales, to pay for the clearing of the lands and the making of some kind of a home thereon, the fact that the timber has become more valuable than the lands is made the excuse for a refusal to carry out that old promise. It is said the timber on this claimed allotment is worth $3900. In seventy years, $4,000 would be produced by less than $500 at six per cent, compounded annually.

The Government's evidence shows that:

> "there are but a very few allotments (already made) on this reservation on which the timber

value is not greatly in excess of any value that can be credited to the land, and generally in these few cases the factors that made for a low timber value would also serve to make the land of but very little value."

No explanation is given of why allotments should have been made to the Quinaielt Indians, under substantially the same conditions, and allotments refused the plaintiff and other Quileutes.

Decree is for complainant as prayed. [15]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jan. 20, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [16]

In the United States District Court, for the Western District of Washington, Southern Division.

No. 111-E

TOMMY PAYNE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Decree.

This cause came duly and regularly on to be heard in open court before Honorable Edward E. Cushman, one of the Judges of the above-entitled court upon the motion of the plaintiff for a decree upon the findings of fact and conclusions of law

heretofore made and entered herein, and the Court being fully advised, grants said motion.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT, That the plaintiff, Tommy Payne, be and he hereby is entitled to the lands heretofore selected by said plaintiff, situated upon the Quinaielt Indian Reservation, within this District, in the State of Washington, to wit: The West One-Half (W½) of the Northwest Quarter (NW ¼) of Section 26, Township 23 North of Range 13 West of Willamette Meridian, containing 80 acres, more or less, and being the portion of the said Quinaielt Reservation, as an allotment to be owned and held by the said plaintiff, in all respects as provided by law.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That the defendant, its officers and agents, be and they hereby are ordered and directed to issue to said plaintiff a certificate of allotment for said lands hereinbefore described, said certificate of allotment to be in effect and to award to the said plaintiff all of the rights to which said plaintiff is entitled under and by virtue of the laws of the United States. [17]

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT, That the defendant, its officers and agents, and all persons claiming by, through or under them, be and they hereby are forever barred and estopped from ever claiming or asserting that said plaintiff, his heirs, executors, administrators, and assigns, are not entitled to said lands, as and for his allotment, with

full right to use, build upon, clear, improve and occupy the same, in all respects as provided by law.

Done in open court this 26th day of Jan. A. D., 1922.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jan. 27, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [18]

In the United States District Court, for the Western District of Washington, Southern Division.

No. 111–E.

TOMMY PAYNE,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Findings of Fact and Conclusions of Law.

This cause came duly and regularly on to be heard in open court before Honorable Edward E. Cushman, one of the Judges of the above-entitled court. The plaintiff appeared in person and by Arthur E. Griffin, his attorney, and the defendant appeared by Thomas P. Revelle, District Attorney, and W. W. Mount, Assistant District Attorney. Evidence was duly and regularly introduced for

and on behalf of the plaintiff and defendant, and the Court being fully advised, makes the following

FINDINGS OF FACT.

I.

That the plaintiff now is and at all times since his birth has been a full blooded Indian, residing upon the Quilleute Reservation in this District, and a member of the Quilleute Tribe of Indians.

II.

That the grounds upon which the court's jurisdiction depends are as follows: That the plaintiff is a full blood Quilleute Indian and a member of the Quilleute Tribe of Indians, born and residing upon the Quilleute Reservation of this District. That the plaintiff is entitled under the treaty made and entered into between the United States and the Quilleute Indians and other bands of Indians, and under the Allotment Acts of the United States to an allotment [19] of at least 80 acres of land upon the Quinaielt Reservation in the State of Washington, and within this District. The jurisdiction of the court further depends upon the acts of August 15, 1894, 28 Statutes at Large 305, and is amended by the act of February 6, 1901, 31 Statutes at Large 760, giving the right to Indians to bring suit against the United States to establish their rights to an allotment of land.

III.

That plaintiff is the head of the family consisting of the plaintiff's wife and three children.

IV.

That about ten years ago the plaintiff duly se-

lected for allotment with the assistance and approval of the then allotting agent of defendant for said Quinaielt Reservation, the following described land as his allotments, described as follows, to wit:

> M. 45, The West one-half (½) of the Northwest Quarter (¼) of Section 26, Township 23, North of Range 13 W., containing 80 acres, the same being a portion of the Quinaielt Reservation, within the District of Washington.

and that ever since said land was so selected by plaintiff, the plaintiff is informed and believes, that the same has been held for the plaintiff, and that all other persons and Indians have been excluded therefrom, and plaintiff desires to go upon said land with himself and family, and to clear the same, and to make his home upon said land so selected.

V.

That the land described is unallotted, unimproved, vacant, Indian lands subject to selection and allotment, under the laws of the United States and plaintiff is lawfully entitled to have said land allotted to him.

VI.

Notwithstanding all of the facts hereinbefore alleged the defendant, its officers and agents have wrongfully failed, neglected and refused to allot the said land to the plaintiff or to issue to [20] the plaintiff any trust or fee patent therefor, and have denied and excluded and still deny and exclude plaintiff from said land, and have refused and still re-

fuse to let plaintiff go upon or reside upon said land or any portion thereof.

Done in open court this 26th day of Jan., A. D. 1922.

EDWARD E. CUSHMAN,
Judge.

And from the foregoing findings of fact, the Court makes the following

CONCLUSIONS OF LAW.

I.

That the plaintiff is entitled to a decree herein adjudging and decreeing that the plaintiff duly selected the lands described in paragraph 4 of the plaintiff's Petition, and is entitled to a Decree adjudging and decreeing that said plaintiff is entitled to said land so described, and all portions thereof, for his allotment, and is entitled to have said land allotted to him by the defendant, its officers and agents.

II.

That the plaintiff is entitled to the immediate possession of said lands, and is entitled to go upon the same with himself and his family, and to build, clear, and improve said lands, and to use the same and all parts thereof for his home for himself and said family, and is entitled to all the rights guaranteed to said plaintiff and the Indians of his said Tribe by the treaty made and entered into by the United States and said Quilleute Tribe and Band of Indians.

III.

That the plaintiff is entitled to a decree estopping

the defendant, its officers and agents from hereafter interfering with the plaintiff in his right to the possession of said lands and his [21] right to improve the same, and estopping the defendant from hereafter claiming or asserting that said plaintiff is not entitled to go upon, clear, improve and build upon said land.

Done in open court this 26th day of Jan., A. D. 1922.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jan. 27, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [22]

United States District Court, Western District of Washington, Southern Division.

No. 111–E—IN EQUITY.

TOMMY PAYNE,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Defendant's Exceptions.

Comes now the above named defendant, United States of America, by its attorneys, Thomas P. Revelle and W. W. Mount, and respectfully excepts

to the decree heretofore made and entered by the Court in the above-entitled cause.

This exception is based upon the ground and for the reason that the property described in the plaintiff's bill of complaint and selected by the plaintiff for allotment is not such land as is suitable for agricultural or grazing purposes as provided by the statute, but on the contrary is heavily timbered and timbered to such an extent that the timber value thereof greatly exceeds the value of said land for agricultural or grazing purposes.

THOMAS P. REVELLE,
United States Attorney,
W. W. MOUNT,
Assistant United States Attorney.

The foregoing exception is hereby allowed this 17th day of May, A. D., 1922.

EDWARD E. CUSHMAN,
United States District Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. May 18, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [23]

United States District Court Western District of Washington Southern Division.

No. 111–E—In EQUITY.

TOMMY PAYNE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Petition and Appeal.

Comes now the above-named defendant, the United States of America, through its attorneys, Thos. P. Revelle and W. W. Mount, feeling itself aggrieved does hereby appeal from the judgment and decree signed and entered in the foregoing cause on the 19th day of January 1922 in the District Court of the United States for the Western District of Washington, Southern Division, and from each and every part thereof and does herewith present its several assignments of error and does hereby pray the allowance of said appeal and that so much and such portions of the record, the statement of facts and exhibits as may be necessary to execute said appeal be forwarded from said Court by the Clerk of the District Court of the United States for the Southern Division of the Western District of Washington, duly certified and authen-

ticated under the seal of the said trial Court to the Circuit Court of Appeals for the Ninth Circuit.

THOS. P. REVELLE,
United States Attorney,
W. W. MOUNT,
Assistant United States Attorney.

Due receipt of a copy of the foregoing Petition and Appeal is hereby acknowledged this 16th day of May, 1922.

GRIFFIN & GRIFFIN,
Attorneys for Plaintiff.

[Indorsed]: Filed in the United States District Court Western District of Washington Southern Division May 17, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [24]

United States District Court Western District of Washington Southern Division.

No. 111-E—In EQUITY.

TOMMY PAYNE,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Assignments of Error.

Comes now the above-named defendant, the United States of America, by and through its attorneys, Thos. P. Revelle and W. W. Mount, and re-

spectfully submits the following assignments of error upon which it relies as supporting its appeal from the Judgment and Decree entered on the 19th day of January 1922 in said cause in the District Court of the United States for the Southern Division of the Western District of Washington and under which assignments of error said appellant seeks reversal of the Decision, Judgment and Decree of said trial Court:

I.

That the District Court erred in sustaining the plaintiff's demurrer to that portion of the defendant's answer alleging that the land mentioned and described in the plaintiff's petition was not such land as is or would be available for agricultural or grazing purposes but on the contrary is heavily timbered and timbered to such an extent that the timber value thereof greatly exceeds the value of said land for agricultural or grazing purposes.

II.

That the District Court erred in finding that the land selected for allotment by the plaintiff, Tommy Payne, was subject to selection and allotment under the laws of the United States [25] and that the plaintiff is lawfully entitled to have such land allotted to him.

III.

That the District Court erred in finding that the officers and agents of the United States of America have wrongfully failed, neglected and refused to allot the said land to the plaintiff or to issue to the

plaintiff any trust or fee patent therefor.

IV.

That the District Court erred in adjudging that the plaintiff was entitled to a decree adjudging and decreeing that the said plaintiff, Tommy Payne, is entitled to the land selected for his allotment and that the plaintiff is entitled to have said land allotted to him by the defendant, its officers and agents.

V.

That the District Court erred in concluding that the plaintiff is entitled to the immediate possession of said lands and is entitled to go upon the same with himself and his family, and to build, clear, and improve said lands, and to use the same and all parts thereof for his home for himself and said family, and is entitled to all the rights guaranteed to said plaintiff and the Indians of his said Tribe by the Treaty made and entered into by the United States and Said Quilleute Tribe and Band of Indians. [26]

VI.

That the District Court erred in concluding that the plaintiff is entitled to a decree estopping the defendant, its officers and agents from hereafter interfering with the plaintiff in his rights to the possession of said lands and his right to improve the same, and estopping the defendant from hereafter claiming or asserting that said plaintiff is not

entitled to go upon, clear, improve and build upon said land.

THOS. P. REVELLE,
United States Attorney,
W. W. MOUNT,
Assistant United States Attorney,
Attorneys for Defendant.

Due receipt of copy of the foregoing assignments of error is hereby acknowledged this 16th day of May 1922.

GRIFFIN & GRIFFIN,
Attorneys for Plaintiff.

[Indorsed]: Filed in the United States District Court Western District of Washington, Southern Division. May 17, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [27]

United States District Court Western District of Washington Southern Division.

No. 111-E—In EQUITY.

TOMMY PAYNE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Order Allowing Appeal.

BE IT REMEMBERED that this matter came on duly for hearing on the petition of the United

States, through its attorneys, Thos. P. Revelle, and W. W. Mount, for the allowance of its petition in appeal in the foregoing entitled cause from the decision of this Court made and entered on the 19th day of January, 1922, and the said appeal being from said Decision to the Circuit Court of the United States of America for the Ninth Circuit; and this Court being fully advised in the premises.

IT IS HEREBY ORDERED that the said appeal be allowed as prayed for and the Clerk of this Court is hereby directed to formulate a true copy of the transcript of the records and proceedings to the extent necessary to properly present said appeal together with exhibits and other matters of record and the memorandum decision and formal Decree of this Court, all duly authenticated, and send same to the said Circuit Court of Appeals for the Ninth Circuit.

Done in open Court this 16th day of May 1922.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. May 17, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [28]

United States District Court Western District of Washington Southern Division.

No. 111–E.

TOMMY PAYNE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Order Extending Time to March 20, 1922, to File Bill of Exceptions.

This matter coming on to be heard before the Honorable Edward E. Cushman, Judge of the above-entitled court, on motion of the above-named defendant, the United States of America, by Thos. P. Revelle, United States Attorney for the Western District of Washington, for an order extending the time within which to file a bill of exceptions in the above-entitled case for a period of sixty days from the nineteenth day of January, 1922, and the Court being fully advised in the premises, now therefore.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendant be allowed until the twentieth day of March, 1922, in which to file a bill of exceptions in the above-entitled cause.

Done in open Court this 30th day of January, 1922.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States of America Western District of Washington, Southern Division. Jan. 30, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [29]

United States District Court Western District of Washington Southern Division.

No. 111-E.

TOMMY PAYNE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Order Extending Time to May 19, 1922, to File Bill of Exceptions.

This matter coming on to be heard before the Honorable Edward E. Cushman, Judge of the above-entitled court, on motion of the above-named defendant, the United States of America, by Thos. P. Revelle, United States Attorney for the Western District of Washington, for an order further extending the time within which to file a bill of exceptions in the above-entitled case for a period of sixty days from the twentieth day of March, 1922, and the Court being fully advised in the premises, now therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendant be allowed

until the nineteenth day of May, 1922, in which to file a bill of exceptions in the above-entitled cause.

Done in open Court this 16th day of March, 1922.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court Western District of Washington Southern Division, Mar. 16, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin Deputy. [30]

In the United States District Court, for the Western District of Washington, Southern Division.

No. 111–E.

TOMMY PAYNE,
Plaintiff

vs.

UNITED STATES OF AMERICA,
Defendant.

Plaintiff's Proposed Statement of Evidence.

Comes now the above-named plaintiff and respondent by Arthur E. Griffin, his attorney, and submits the following as a true and complete statement of all the evidence essential to the decision of the questions presented by the appeal of the defendant and appellant, from the decree entered herein against the defendant and in favor of the plaintiff:

Testimony of Tommy Payne, for Plaintiff.

TOMMY PAYNE testified that he is a full blooded Indian of the Quileute Tribe, born and raised on the Quileute Reservation, and now fifty-five years of age. He has a family consisting of a wife and five children.

That the Quileute Reservation is about one mile square, and about two hundred Indians live on it. The village on the reservation is called La Push. The Indian name of his father was Tah-ah-ha-wht'l, who was the same man who signed the treaty for the Quinaielt and Quileute Indians with Governor Stevens, July 1st, 1855.

That the Quinaielt Reservation was surveyed about twelve years ago, at which time he selected on this Reservation an eighty acre tract of land for allotment, more particularly described as follows:

> "M. 45. The West one-half (W ½) of the Northwest quarter (NW ¼) of Section 26, Township 23 North of range 13W.; containing 80 acres, the same being a portion of the Quinaielt Reservation, within the District of Washington."

This selection was made through Mr. Archer, at that time the allotting agent for the Government. Mr. Archer [31] instructed his assistant to go and see the plaintiff together with the rest of the people that were entitled to an allotment at that time, and they showed plaintiff maps and locations of where there was good lands for agricultural purposes; that is howe he got this. They took his

(Testimony of Tommy Payne.)

name and it is recorded with the land that he selected there. That it is the desire and intention of the plaintiff to go upon that land and make it his home as soon as he is permitted to do so by the government officials. The land selected is part of the Quinaielt Reservation in this State.

Concerning the character of the land selected, the plaintiff testified that about half the land is heavily timbered with cedar and hemlock, and the remainder bottom land with clay soil. The character of the land is very similar to all the lands along the Raft and Queets River, which is mostly bottom land, clay soil. Part of the land is open along that bottom. That if the timber were removed it would make good agricultural land. That it is necessary now that the Indians should have agricultural lands in order to support their families because they are having a hard time to support their families on account of their fish getting played out, and the seal hunting getting very poor and all other things along the river where they used to make their living has gotten so that they are restricted from getting the fish and making their living, which is why it is necessary for them to all move over to their allotment if they are given their right. That the plaintiff has supported his family on fishing and sealing and hunting, but those things are all played out, and in a few years they do not not know what they are going to do. That the Indians used to hunt sea otter years ago, but that is all gone. These big purse seine com-

(Testimony of Tommy Payne.)

panies have gotten so thick now that the Indians' fish that used to be in the water are pretty [32] nearly all destroyed, and the white people have fished out the Quileute River that runs down by their reservation.

That plaintiff feels sure he can support his family if given the right to that land; that both white people and Indians along the Queets River are making a good living to-day out of their farms along the river, and the Queets River is about six miles from the land plaintiff selected, and also the Raft River. Indian canoes can go in the Raft River at any time, and a boat that would draw eight feet can enter the Raft River at high tide.

That was about 12 years ago that plaintiff made this selection, at the time they were surveying, and this land had been surveyed when he took up this selection. That the nearest settlement to this land is a settlement called Queets where there is a large cannery and store. That plaintiff has always been willing and anxious to go upon the allotment and live upon it as an allotment. That plaintiff is seeking this allotment for himself, to hold permanently, but that his small children he expects to take care of and support while under his care, if he is allowed to go upon this allotment. At this point counsel for plaintiff, this respondent, introduced the third paragraph of defendant's answer as going to prove the fact that the Government had excluded him from the land, which was admitted by the Court.

Testimony of Joe Pullen, for Plaintiff.

Joe Pullen, an Indian of the Quileute Tribe who has also made a selection, testified that the locality where Tommy Payne had made his selection was partly bottom land and fit for agricultural purposes in some place, but a little further in it is kind of heavy timber, pretty hard to clear, but not what you would call timber land, though there is some timber on it. That the soil is clay soil, and the portion where it is the most heavily timbered would be good for grazing or agriculture with the timber removed. That the land is not all bottom land but is brushy land. [33] The witness characterized a part of the land as "brushy," about one-third of the tract as fit for agriculture and the timbered area as containing some merchantable timber.

On cross-examination the witness testified that he had gone over the Raft River country, and also the Queets and Quinaielt River country, but did not know exactly the location of the land in question, though he had gone along a creek, Red River, and both sides of it were kind of level land; that he had been up the Raft River once, and had passed through the land between the Raft River and the Red River, but not further in. That nearly all the land going up the river is bottom land and one can tell that one-third of the 80 acres is bottom land, but further in is kind of heavy timber, as

(Testimony of Jack Ward.)

it is always that way in creeks, not big rivers; that witness thought he must have passed through that land if it is close to that red river.

Testimony of Jack Ward, for Plaintiff.

Jack Ward, also a member of the Quileute Tribe of Indians, testified he had known plaintiff all his life; that he had lived at Quileute, and that the testimony in regard to the fish being depleted in the ocean and the rivers in the neighborhood of the Quileute Reservation, and the number of people on that reservation, was true. That the witness had been in the locality of the land selected by Tommy Payne several times; that the land is the same as around the Queets country where the farmers live; that he would say pretty near one-half of that selection was good for agricultural land, and the other half toward the hill is timber, and if the timber were removed would be about the right kind of land for agriculture, and grazing. That he should judge about 30 acres of this selection is open-like and brushy, and the other fifty is where the timber lies. That he had been up in the Queets country which [34] is about six miles from the Raft river, the biggest part of which is inside the reservation, where the Indians have cleared their land and live on it to make a living there. In the Queets River there are about eight Indian families and right across the river there are over twenty white families. That one farmer living right across from one of the Indian farms

(Testimony of Jack Ward.)

has about 40 head of cattle and has cleared about sixty acres of his ranch, and the land in the Raft river territory, including the land Mr. Payne selected, is as good, and of the same character, as the land where the eight Indian families and twenty white families have cleared land.

That the Quinaielt Indians have lands upon that reservation, and that some of the Quileutes have been allotted, but a great majority of the Quileutes have been refused their allotments.

Not all of the land selected by Mr. Payne is suitable for agriculture now. Most of those lands in that valley were just like the one Mr. Payne selected, and now they have big farms out of it.

That the witness had been on Tommy Payne's selection a year ago this last fall (the fall of 1920), but did not remember how many times he had been upon it; that he had hunted through that part of the country; that he did not know the location of the land by the posts, but had been around that vicinity and over that Raft River. That there might be a few hemlocks besides spruce and cedar, but that he did not know about fir.

The evidence submitted on behalf of the Government is contained in a letter addressed to the Commissioner of Indian Affairs signed by Superintendent Eugene W. Hill of Taholay, Washington, and introduced in evidence as Defendant's Exhibit "A", which letter is as follows: [35]

Defendant's Exhibit "A".

"LOCATION.—This tract of land lies on Raft River and about two or two and one-half miles from the mouth of the River. A poor and very slightly used foot trail goes through the tract and is the only means of getting to this or any of the adjacent land. The nearest habitation of any sort is upon the Queets River, about 8 miles distant from the tract and is reached by going along the beach. There is no road of any sort between Raft River and the Queets. Raft River is about 11 miles from Taholah and is reached by going up the beach at low tides and crossing the bluffs on very poor trails which are almost impassable more than half of the year. Very small gas boats (30 feet or so in length) can enter Raft River at high tide and with a quiet sea but the river is too small and shallow to permit of large boats entering or of small boats entering at any but full tides."

"LAND.—About 30 acres of the land consists of level and fairly rich bottom which would, if cleared, make good farm land. The balance (50 acres) consists of rolly bench and side hill slope to the higher land back from the river, and would, if cleared, make grazing and possibly farm land. The land is all heavily timbered, however, and clearing such land would cost from $150 to $250 per acre, and situated as it is the land when cleared could probably scarce pay for the taxes."

"TIMBER.—The timber on the area consists of a mixed stand as shown by the cruise below, the

cedar predominating. As in the case of timber near the salt water it is not of the best quality, but it is all sound, of good quality (not best) and it is not at present deteriorating."

	NW¼	NW¼; SW¼ NW¼.	Totals	
Cedar	474000	272000	746000	board feet
Spruce	133000	81000	214000	" "
Fir (Amabalis)..	23000	42000	65000	" "
Hemlock	3000	10000	13000	" "
Cedar Bolts.....	500	580	1080	cords
Cedar Poles	5000	10000	15000	linear feet.

"VALUE.—(a) Land. On the same basis that we use in appraisals in this vicinity the land would be worth in the vicinity of $400.00. However, this is largely theoretical value, as, situated where it is, the land alone means very little and has whatever value is attached to it because of the timber. The land is of fairly good quality and as such has some value, but in the case of timber lands, it is generally the timber that is sold and the prices are based on the timber with the land thrown in. Where the land is of good quality it would increase the value of the tract. The land in this case, being as inaccessible as it is, would still have some value but it would be largely a paper value and a very poor sale value."

"(b) Timber. The timber on this tract would be worth about $3900.00, making the entire tract worth some $4300.00. [36]

The timber has an actual sale value and is both salable and marketable even though it is removed from any present scenes of logging or milling,

Timber being removed from present markets and railroads lowers the price of it but it still has ready sales and in the case of a tract such as this the timber really carries whatever value may be attached to the land."

"Regardless of whether the values placed on the land and timber on this tract are either somewhat high or low there is no question but that the value of the timber is greatly in excess of the value of the land either for agricultural or grazing purposes. The estimates shown above would indicate that the land value is approximately 10% that of the timber value and if anything it's a question of whether this additional 10% should not be credited to the timber as it is really the timber that makes this value possible."

"In this connection it can also be said that there are but a very few allotments (already made) on this reservation on which the timber value is not greatly in excess of any value that can be credited to the land, and generally in these few cases the factors that made for a low timber value would also serve to make the land of but very little value."

After the admission in evidence of the above letter, counsel for plaintiff expressed a desire to cross-examine Mr. Hill in reference to the report, in regard to the accessibility of the land, the character of the timber on it and the value of the timber claims in that locality and of the timber upon that land, but the Court admitted the same as a Government record, stating counsel for plain-

tiff could subpoena Mr. Hill as a witness to cross-examine him if he desired to do so.

At this point the following took place:

Mr. MOUNT.—I would be willing to stipulate, if counsel is willing to concede it, that there has not been any allotment made under the terms of the treaty with the Quileute and Quinaielt Indians, made July 1st, 1885, and no allotment made on the reservation until long after the passage of the Act of February 8th, 1887. Other than that I cannot see [37] that any additional witnesses would be of advantage, because we have in evidence practically everything that our witnesses would testify to, with this record, and statement that there were no allotments made under the treaty, and that allotments were not made until after the Act of Congress of 1887. That is substantially what we would prove were our witnesses present.

Mr. GRIFFIN.—I think that is very largely a question of law. The treaty gave these Indians certain rights and the allotment Act provides that where allotments are provided in the treaty and the amount provided for in the treaty, it gives the Indians a right to a greater amount than eighty acres, the treaty shall govern. However, this plaintiff is only, in this suit, demanding that he be allotted the eighty acres selected by him. The Government has taken the position for a long time that they would not allot to the Indians in excess of eighty acres in all the treaties where the provisions are substantially the same as they are here. Under the statute he is clearly entitled to eighty

acres and he is also entitled to eighty acres under the treaty, if no more.

The COURT.—And he has not got any?

Mr. GRIFFIN.—He has not got any.

The COURT.—And this, which Mr. Mount is asking you to concede, does not conflict with that.

Mr. GRIFFIN.—I am willing to concede that allotments were not made until after '87.

The COURT.—Whether it was made under the Treaty or under the Act, you claim that it is a proposition of law, and you are not conceding it, as a matter of fact?

Mr. GRIFFIN.—No. * * *" [38]

ARTHUR E. GRIFFIN, offered himself as a witness in reference to the amount of timber upon fair, good and extra good timber claims. Before allowing him to be sworn in, the Court questioned Mr. Griffin as follows:

The COURT.—Then you are conceding what he (Mr. Mount) asks except you are not conceding that the allotments that were made were made pursuant to the act of '87 to the exclusion of the treaty?

Mr. GRIFFIN.—Yes.

The COURT.—You are leaving that open as a question of law?

Mr. GRIFFIN.—Yes.

Testimony of Mr. Griffin, for Plaintiff.

Being duly sworn Mr. GRIFFIN testified that he had lived in the State and territory of Washington since the 15th of April, 1884; that during that time he had assisted in surveying a number

(Testimony of Mr. Griffin.)

of timber claims and assisted in cruising a number of timber claims; had been familiar with the amount of timber upon the timber claim by representing clients that have been buying, and had examined the abstracts of many claims which had been bought by his clients. That he had also been along the Pacific Coast south of the Makan reservation at Cape Flattery, and further on down to the Suez river and owned one timber claim near the Suez river. That he had also been down to the Quileute reservation and examined timber claims to some extent. That he had made many inquiries among timber men as to the amount of timber upon claims which were considered fair and good timber claims and exceptionally good timber claims.

Witness testified that in his judgment a timber claim of 160 acres which has less than four million feet, would be classed as a poor timber claim. A claim of five million feet to seven and a half million feet, would be considered a good timber claim, [39] referring to a 160-acre claim. Claims from seven and a half to fifteen million feet and above that are considered exceedingly good timber claims.

In regard to the amount of timber on this tract of land, the amount of timber is given in board feet and in cords for bolts. That on an average they consider a cord of bolts about equals a thousand feet board measure in lumber, which is the amount applied to the two claims, which would

(Testimony of Mr. Griffin.)

make this about a two million foot claim, for 160 acres. This Indian claims the right to that land because of the fact that he is an Indian and because the treaty gives him the right to it, and because the statute gives him the right to it. This eighty would be half of a claim as is generally considered by timber men in buying claims, 160 acres.

Witness also testified that land upon which cedar and spruce grow in the State of Washington is usually good agricultural land after the timber is removed.

Upon cross-examination the witness testified that if there was only one million feet of timber on the eighty in question he would classify it as agricultural land rather than a timber claim, and that it would be agricultural land regardless of whether the timber was on it or not.

In regard to his experience in cruising timber, the witness testified that in the early days he had been located at Enumclaw and assisted in surveying and subdividing several sections of land up there which Robert Wingate had purchased from the Northern Pacific; that at that time there was a big tract of country extending up the White River for miles and settlers were coming in at that time taking up claims from eighty acres on; that witness was interested in developing that country and on behalf of Mr. Cooper, agent of the Northern Pacific Railway Company, [40] assisted a num-

(Testimony of Mr. Griffin.)

ber of people to settle in there, went with them and found the corners of their ground where it was possible to find them and assisted them in locating their claims, also further north and east up the White River and Natches Pass. He never following timber cruising as a profession or as a business. That he assisted the Northern Pacific Engineers in locating the main line of the Northern Pacific Railway Company from about Coal Creek, which is a little east of Enumclaw, over the summit of the Cascade Mountains, and assisted in surveying the old switchback over the top of the mountains in 1885, which was location work.

Respectfully submitted,
ARTHUR E. GRIFFIN,
Attorney for Respondent. [41]

United States District Court, Western District of Washington, Southern Division.

No. 111–E.

TOMMY PAYNE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Order Approving Statement of Evidence.

I, Edward E. Cushman, Judge of the above-entitled Court, and the Judge before whom the

above case was tried, upon stipulation of plaintiff's counsel hereto attached, do hereby certify, the plaintiff and the defendant having been represented by their respective counsel in open Court, that the foregoing is a true and complete statement of all the evidence essential to the decision of the questions presented by the appeal of the defendant from the judgment entered herein against the defendant and in favor of the plaintiff; and I do hereby approve the same as the statement of the evidence in said matter for the purpose of said appeal, and do hereby order that the same become a part of the record for the purpose of said appeal, and order further that all the original exhibits be transmitted to the Appellate Court.

Done in Court this 15th day of July, A. D. 1922.

EDWARD E. CUSHMAN,
United States District Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jul. 15, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [42]

The evidence submitted on behalf of the Government is contained in a letter addressed to the Commissioner of Indian Affairs and signed by Superintendent Eugene W. Hill of Taholah, Washington, and marked as Government's Exhibit "A". The letter is as follows:

Government's Exhibit "A".

"LOCATION.—This tract of land lies on Raft River and about two or two and one-half miles from

the mouth of the River. A poor and very slightly used foot trail goes through the tract and is the only means of getting to this or any of the adjacent land. The nearest habitation of any sort is up on the Queets River, about 8 miles distant from the tract and is reached by going along the beach. There is no road of any sort between Raft River and the Queets. Raft River is about 11 miles from Taholah and is reached by going up the beach at low tides and crossing the bluffs on very poor trails which are almost impassable more than half of the year. Very small gas boats (30 feet or so in length) can enter Raft River at high tide and with a quiet sea but the river is too small and shallow to permit of large boats entering or of small boats entering at any but full tides.

"LAND.—About 30 acres of the land consists of level and fairly rich bottom which would, if cleared, make good farm land. The balance (50 acres) consists of rolly bench and side hill slope to the higher land back from the river, and would, if cleared, make grazing and possibly farm land. The land is all heavily timbered, however, and clearing such land would cost from $150 to $250 per acre, and situated as it is the land when cleared could probably scarce pay for the taxes.

"TIMBER.—The timber on the area consists of a mixed stand as shown by the cruise below, the cedar predominating. As is the case of timber near the salt water it is not of the best quality, but it is all sound, of good quality (not best) and is not at present deteriorating.

	NW¼	NW¼	SW¼	NW¼.	Totals	
Cedar	474000		272000	746000	board	feet
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"VALUE.—(a) Land. On the same basis that we use in appraisals in this vicinity the land would be worth in the vicinity of $400.00. However this is largely a theoretical value as, situated where it is, the land alone means very little and has whatever value is attached to it because of the timber. The land is of fairly good quality and as such has some value, but in the case of timber lands, it is generally the timber that is sold and the prices are based on the [43] timber with the land thrown in. Where the land is of good quality it would increase the value of the tract. The land in this case, being as inaccessible as it is, would still have some value but it would be largely a paper value and a very poor sale value.

"(b) Timber. The timber on this tract would be worth about $3900.00, making the entire tract worth some $4300. The timber has an actual sale value and is both salable and marketable even though it is removed from any present scenes of logging or milling. Timber being removed from present markets and railroads lowers the price of it but it still has ready sales and in the case of a tract such as this the timber really carries whatever value may be attached to the land.

"Regardless of whether the values placed on the land and timber on this tract are either somewhat high or low there is no question but that the value of the timber is greatly in excess of the value of the land either for agricultural or grazing purposes. The estimates shown above would indicate that the land value is approximately 10% that of the timber value and if anything it's a question whether this additional 10% should not be credited to the timber as it is really the timber that makes this value possible.

"In this connection it can also be said that there are but a very few allotments (already made) on this reservation on which the timber value is not greatly in excess of any value that can be credited to the land, and generally in these few cases the factors that made for a low timber value would also serve to make the land of but very little value." [44]

United States District Court, Western District of Washington, Southern Division.

No. 111–E.

TOMMY PAYNE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Order Extending February Term.

This matter coming on regularly for hearing this first day of July, 1922, upon the motion of W. W.

Mount, attorney for the above-named defendant, and the Court being fully advised,

IT IS HEREBY ORDERED that the February Term, 1922, of the above-entitled Court be held open and continued as to the above-entitled case for a period of thirty days from this date.

Done in open Court this first day of July 1922.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jul. 1, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [45]

United States District Court, Western District of Washington, Southern Division.

No. 111–E.

TOMMY PAYNE,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Praecipe for Transcript of Record.

To the Clerk of the above Court:

Kindly prepare, certify and transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, a typewritten transcript of the record on appeal in the above-entitled cause, to wit:

1. Bill of complaint.
2. Answer.
3. Demurrer to answer.
4. Memorandum decision on Demurrer.
5. Memorandum decision on the Merits.
6. Decree.
7. Findings of fact and conclusions of Law.
8. Defendant's Exceptions.
9. Petition for appeal.
10. Assignment of errors.
11. Order allowing appeal.
12. Order extending time to March 20, 1922, to file bill of exceptions. [46]
13. Order extending time to May 19th, 1922, to file bill of exceptions.
14. Plaintiff's proposed statement of evidence.
15. Order approving statement of evidence.
16. Defendant's Exhibit "A".
17. Citation.
18. Praecipe of defendant for record on appeal.
19. Order extending February Term.
20. Order extending time for filing record in Circuit Court of Appeals.

Dated at Tacoma, Washington, June 10 1922.

THOS. P. REVELLE,
United States Attorney,
W. W. MOUNT,
Assistant United States Attorney,
Attorneys for Defendant.

Service in the foregoing praecipe is hereby admitted this 13th day of July, 1922.

GRIFFIN & GRIFFIN,
Attorneys for Plaintiff.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jul. 1, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy Clerk. [47]

United States of America,
Western District of Washington,—ss.

Certificate of Clerk U. S. District Court, to Transcript of Record.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing pages numbered from one to fifty inclusive, contain a true and correct transcript of the record on appeal in the case of Tommy Payne, Plaintiff, versus The United States of America, Defendant, No. 111–E, in said District Court, as required by praecipe of Thos P. Revelle, United States District Attorney and W. W. Mount, Assistant United States District Attorney, attorneys for the United States, appellant herein, filed and shown herein as the originals appear and are of record in my office in said district at Tacoma.

I further certify and return that I hereto attach and transmit the original citation, the original order extending time in which to file the record of appeal herein with the Circuit Court of Appeals, and that I am also transmitting herewith, the original Exhibits filed in said cause, said exhibits being as follows:

Defendant's Exhibit "A."

Attest my hand and the seal of said District Court at Tacoma, in said District, this 21st day of June, A. D. 1922.

[Seal] F. M. HARSHBERGER,
Clerk.
By Alice Huggins,
Deputy Clerk. [48]

United States District Court, Western District of Washington, Southern Division.

No. 111–E.

TOMMY PAYNE,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Citation on Appeal.

United States of America, to Tommy Payne and Griffin & Griffin, His Attorneys, GREETINGS:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, California, thirty days from and after the days this citation bears date, pursuant to an appeal allowed and filed in the Clerk's Office of the United States District Court for the Western District of Washington, Southern Division, wherein the United States of America is the appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as

in said appeal mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable EDWARD E. CUSHMAN, Judge of the United States District Court of the Western District of Washington, Southern Division, this 16th day of May, A. D. 1922.

EDWARD E. CUSHMAN,
United States District Judge. [49]

United States District Court, Western District of Washington, Southern Division.

No. 111–E.

TOMMY PAYNE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Order Extending Time to and Including August 1, 1922, to File Record and Docket Cause.

BE IT REMEMBERED that this matter came on duly and regularly before this Court, and it appearing to the Court that good cause has been shown why the time for filing record on appeal with the Circuit Court of Appeals should be extended;

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that the date and time for filing the record on appeal herein with the Circuit Court of Appeals for the Ninth Circuit, at San

Francisco, California, be, and the same is hereby extended to and including the 1st day of August, 1922.

Done in open court this 20th day of July, 1922.

EDWARD E. CUSHMAN,
Judge U. S. District Court.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jul. 20, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [50]

[Endorsed]: No. 3897. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Appellant, vs. Tommy Payne, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed July 24, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: Printed Transcript of Record. Filed August 21, 1922, F. D. Monckton, clerk.

58 [Title omitted.]

Order of submission.

(Filed Sept. 20, 1922.)

Ordered appeal in the above-entitled cause argued by Mr. Arthur E. Griffin, counsel for the appellee, Mr. John A. Frater, assistant United States attorney and counsel for the appellant, submitting cause on brief on file, and submitted to the court for consideration and decision.

59 [Title omitted.]

Order filing opinion, Dec. 4, 1922.

By direction of the Honorable William B. Gilbert and William H. Hunt, circuit judges, and the Honorable Frank H. Rudkin, district judge, before whom the causes were heard, ordered that the typewritten opinion this day rendered by this court in each of the following-entitled causes be forthwith filed by the clerk, and that a judgment or decree be filed and recorded in the minutes of this court in each of the causes in accordance with the opinion filed therein: * * *

[Title omitted.]

60 *Opinion.*

(Filed Dec. 4, 1922.)

[Title omitted.]

Appeal from the United States District Court for the Western District of Washington, Southern Division.

Before Gilbert and Hunt, circuit judges, and Rudkin, district judge:

HUNT, Circuit Judge:

From a decree directing the agents of the United States to issue to Tommy Payne, an Indian of the Quileute Tribe, a certificate of allotment to a certain tract of land in the Quinaielt Reservation, Washington, the United States appeals. The present suit was brought under the act of 1894 (28 St., p. 305), as amended by act of February 6, 1901 (31 St. 760).

Pursuant to a treaty made with the Quinaielt and other Indians, certain lands were reserved to be surveyed and set apart for the "exclusive use" of the Indians. The treaty was made July 1, 1855, and concluded January 25, 1856, and was ratified March 8, 1859. (12 St. 971; 36 St. 1345.)

In February, 1887 (24 St. 388), Congress passed an allot-
61 ment act, which was amended by act of February 28, 1891, (ch. 383, sec. 1), and act of June 25, 1910 (ch. 431, sec. 17), providing that in all cases where any tribe of Indians has been located upon any reservation created for their use by treaty, stipulation, act of Congress, or Executive order, the President shall be authorized to cause the same to be surveyed or resurveyed "whenever in his opinion any reservation or any part thereof may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interests, not to exceed 80 acres of agricultural, or 160 acres of grazing land to any one Indian."

About 1911, after survey made in 1910, through an allotting agent for the United States, Payne made a selection of the land here involved, and his name was recorded, but he has been excluded from the land. The land selected by Payne is in part heavily timbered and in part bottom land with clay soil, but there is evidence that the value of the timber is greater than the value of the land for agriculture or grazing. Because of such value conditions the Government pleads that the land selected is not subject to allotment and that therefore allotment has been refused, and Payne has been rightfully excluded.

The question before us is whether, under the cited act of Congress of 1887, the land Payne selected should be excluded from allotment because it is in part heavily timbered and until cleared is doubtless more valuable for timber than for agriculture or grazing.

62 The provisions of the treaty contained no restriction as to the character of the land to be located, and we do not regard the provisions of the act of 1887, supra, as so limiting the authority of the President that he may not order allotment of lands included in the reservation made under the treaty provisions and surveyed. The discretion of the President having been exercised in relation to survey, as contemplated by the treaty, the provisions of Article V of the treaty, heretofore referred to, indicate that the makers of the treaty knew that clearing of the lands was as necessary as breaking up for cultivation. Furthermore, judicial knowledge will be taken of the fact that when the treaty was made, the reservation was in a timbered area of the country. The allotment statute of 1887 was general in character and contemplated that lands held by the United States under Indian treaty cessions might be surveyed or resurveyed when, in the opinion of the President, the lands could be advantageously used for farming or grazing purposes by the Indians. Whether the lands could be advantageously used for agriculture or grazing by the Indians was left to the opinion of the President; but when the opinion that such advantageous use might be made was formed, then allotment is to be made, not necessarily of any given quantity, but only in such areas as in the opinion of

the President may be for the best interests of the Indians, not to exceed 80 acres for agricultural, or 160 acres for grazing purposes to any one Indian. But, where survey has been made and selection has been made, the authority to allot can not be made dependent upon the comparative value of the land for timber or agriculture or grazing purposes. Leecy vs. United States, 190 Fed. 289.

63 The construction outlined seems specially fair in the case of the Quileute Indians, who gave up a large area under assurances that they would have a reservation in the heavily-timbered wilderness selected by them and the other makers of the treaty.

Our conclusion is that the allotment act of 1887 does not prevent the carrying out of the true intent of the treaty provisions, and that Payne is entitled to the land selected.

Decree affirmed.

[File endorsement omitted.]

64 [Title omitted.]

Decree.

(Filed Dec. 4, 1922.)

Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Washington, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said District Court in this cause be, and hereby is, affirmed.

[File endorsement omitted.]

65 [Title omitted.]

Petition for stay of mandate.

(Filed Jan. 2, 1923.)

To the Honorable Judges of the Above-Entitled Court:

Comes now Thos. P. Revelle and W. W. Mount, attorneys for the appellant in the above-entitled case and respectfully petition this honorable court for an order staying the execution of the mandate on the opinion filed December 4th, 1922, for a period of thirty days from and after the date of expiration of the time for filing a petition for rehearing in the above cause.

This petition is made pursuant to telegraphic instructions received from the Attorney General of the United States asking additional time for the purpose of determining the advisability of ap-

pealing the above-entitled case to the Supreme Court of the United States.

Respectfully submitted.

THOS. P. REVELLE,
United States Attorney,
Western District of Washington.
W. W. MOUNT,
Assistant United States Attorney,
Western District of Washington.

Dated San Francisco, Cal., January 2, 1923.

So ordered:

W. H. HUNT,
United States Circuit Judge.

[File endorsement omitted.]

66 [Title omitted.]

Order staying mandate.

(Filed February 1, 1923.)

This matter coming on regularly to be heard on this 1st day of February, 1923, on the petition of Thos. P. Revelle and W. W. Mount, attorneys for the appellant in the above-entitled cause, requesting an additional stay of the execution of the mandate on the opinion rendered by this court and filed with the clerk on December 4th, 1922, and the court being fully advised in the premises,

It is ordered that the mandate in the above-entitled cause be stayed until the first day of March, 1923.

Dated this 1st day of February, 1923.

WM. W. MORROW,
United States Circuit Judge.

[File endorsement omitted.]

67 [Title omitted.]

Notice of appeal.

(Filed February 2, 1923.)

The above-named defendant and appellant, conceiving itself aggrieved by the decision, judgment, and decree entered in the above-entitled proceeding by the United States Circuit Court of Appeals for the Ninth Circuit, does hereby appeal from said judgment and decree to the Supreme Court of the United States, and it prays that this, its appeal, may be allowed and that a transcript of the record

and proceedings and papers upon which said judgment and decree were made, duly authenticated, may be sent to the Supreme Court of the United States.

H. H. DAUGHERTY,
Attorney General,
THOS. P. REVELLE,
United States Attorney,
Western District of Washington,
Attorneys for Defendant, Appellant.

[File endorsement omitted.]

68 [Title omitted.]

Assignments of error.

(Filed Feb. 2, 1923.)

Comes now the United States of America, defendant, appellant, by and through its attorneys, H. H. Daugherty and Thos. P. Revelle, and make and file this their assignments of error and upon which it relies as supporting its appeal from the judgment and decree entered on the fourth day of December, 1922, in the Circuit Court of Appeals for the Ninth Circuit of the United States, and under which assignments of error said appellant seeks the reversal of the decision, judgment, and decree of said Circuit Court:

I.

That the Circuit Court erred in sustaining the District Court's error in sustaining the plaintiff's demurrer to that portion of the defendant's answer alleging that the land mentioned and described in the plaintiff's petition was not such land as is or would be available for agricultural or grazing purposes, but, on the contrary, is heavily timbered, and timbered to such an extent that the timber value thereof greatly exceeds the value of said land for agricultural or grazing purposes.

II.

That the Circuit Court erred in sustaining the District Court's error in finding that the land selected for allotment by the plaintiff, Tommy Payne, was subject to selection and allotment under the laws of the United States and that the plaintiff is lawfully entitled to have such land allotted to him.

69 III.

That the Circuit Court erred in sustaining the District Court's error in finding that the officers and agents of the United States of America have wrongfully failed, neglected, and refused to allot the said land to the plaintiff or to issue to the plaintiff any trust or fee patent therefor.

IV.

That the Circuit Court erred in sustaining the District Court's error in adjudging that the plaintiff was entitled to a decree adjudging and decreeing that the said plaintiff, Tommy Payne, is entitled to the land selected for his allotment and that the plaintiff is entitled to have said land allotted to him by the defendant, its officers and agents.

V.

That the Circuit Court erred in sustaining the District Court's error in concluding that the plaintiff is entitled to the immediate possession of said lands and is entitled to go upon the same with himself and his family, and to build, clear, and improve said lands, and to use the same and all parts thereof for his home for himself and said family, and is entitled to all the rights guaranteed to said plaintiff and the Indians of his said tribe by the treaty made and entered into by the United States and said Quilleute Tribe and Band of Indians.

VI.

That the Circuit Court erred in sustaining the District Court's error in concluding that the plaintiff is entitled to a decree estopping the defendant, its officers and agents from hereafter interfering with the plaintiff in his rights to the possession of said lands and his right to improve the same, and estopping the defendant from hereafter claiming or asserting that said plaintiff is not entitled to go upon, clear, improve, and build upon said land.

H. H. DAUGHERTY,
Attorney General,
THOS. P. REVELLE,
United States Attorney,
Western District of Washington,
Attorneys for Defendant, Appellant.

70 Due acknowledgment of service of a copy of within assignments of error is admitted this 31st day of January, 1923.

ARTHUR E. GRIFFIN,
Attorney for Plaintiff-Appellee.

[File endorsement omitted.]

71 [Title omitted.]

Order allowing appeal.

(Filed February 2, 1923.)

Be it remembered that this matter came on duly for hearing on the petition of the United States, through its attorneys, H. H. Daugherty and Thos. P. Revelle, for the allowance of its petition in appeal

in the foregoing-entitled cause from the decision of this court made and entered on the 4th day of December, 1922, and the said appeal being from said decision and formal decree to the Supreme Court of the United States, and this court being fully advised in the premises.

It is hereby ordered that the said appeal be allowed as prayed for, and the clerk of this court is hereby directed to formulate a true copy of the transcript of the records and proceedings to the extent necessary to properly present said appeal, together with exhibits and other matters of record and the memorandum decision and formal decree of this court, all duly authenticated, and send same to the said Supreme Court of the United States.

Done in open court this 2d day of February, 1923.

WM. W. MORROW,
U. S. Circuit Judge.

[File endorsement omitted.]

72 [Title omitted.]

Praecipe for transcript of record.

(Filed Feb. 12, 1923.)

To the Clerk of the Above Court:

Kindly prepare, certify, and transmit to the clerk of the Supreme Court of the United States, at Washington, D. C., a typewritten transcript of the record on appeal in the above-entitled cause, to wit:

1. Bill of complaint.
2. Answer.
3. Demurrer to answer.
4. Memorandum decision on demurrer.
5. Memorandum decision on the merits.
6. Decree.
7. Findings of fact and conclusions of law.
8. Defendant's exceptions.
9. Petition for appeal.
10. Assignment of errors.
11. Order allowing appeal.
12. Order extending time to March 20, 1922, to file bill of exceptions.
13. Order extending time to May 19th, 1922, to file bill of exceptions.
14. Plaintiff's proposed statement of evidence.
15. Order approving statement of evidence.
16. Defendant's Exhibit "A."
17. Citation.

73 18. Praecipe of defendant for record on appeal.

19. Order extending February term.

20. Order extending time for filing record in Circuit Court of Appeals.
21. Notice of appeal.
22. Assignment of errors.
23. Order allowing appeal.
24. Order staying mandate.
25. Order staying mandate.
26. Praecipe of defendant, appellant, for record on appeal.

Dated at Tacoma, Washington, January 31st, 1923.

H. H. DAUGHERTY,
Attorney General,
THOS. P. REVELLE,
United States Attorney,
Western District of Washington,
Attorneys for Defendant, Appellant.

Copy of the within praecipe received February 5, 1923.

ARTHUR E. GRIFFIN,
Attorney for Plaintiff, Appellee.

[File endorsement omitted.]

74 [Title omitted.]

Certificate of clerk.

I, Frank D. Monckton, as clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing seventy-three (73) pages, numbered from and including 1 to and including 73, to be a full, true, and correct copy of the record under rule 8 of the Supreme Court of the United States, in the above-entitled cause, including the assignment of errors on appeal to the Supreme Court of the United States and of all proceedings had, and of all papers, including the opinion filed in the said Circuit Court of Appeals in the above-entitled case, including defendant's Exhibit "A," filed July 24, 1922, made pursuant to praecipe of counsel for the appellant, filed February 12, 1923, as the originals thereof remain on file and appear of record in my office, and that the same constitutes the transcript of record upon appeal to the Supreme Court of the United States in the above-entitled cause.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, this 15th day of February, A. D. 1923.

[SEAL.]

F. D. MONCKTON,
Clerk.
By PAUL P. O'BRIEN,
Deputy Clerk.

75 [Title omitted.]

Citation on appeal.

(Filed Feb. 12, 1923.)

United States of America, to Tommy Payne and Griffin & Griffin, his attorneys, Greetings:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, D. C., on the 2d day of April, 1923, pursuant to an appeal, filed in the clerk's office of the Circuit Court of Appeals of the United States for the Ninth Circuit, wherein the United States is defendant, appellant, and Tommy Payne is plaintiff, appellee, to show cause, if any there be, why the judgment and decree in the said appeal mentioned should not be corrected, and speedy justice should not be done to the parties on that behalf.

Witness, the Hon. William W. Morrow, United States Circuit Judge, this 2d day of February, in the year of our Lord one thousand nine hundred twenty-three.

WM. W. MORROW,
U. S. Circuit Judge.

76 Service of a copy of within citation on appeal admitted Feb. 5, 1923.

ARTHUR E. GRIFFIN,
Attorney for Plaintiff, Appellee.

[File endorsement omitted.]

[Indorsed on cover:] File No. 29445. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 240. The United States of America, Appellant, *vs.* Tommy Payne. Filed March 6th, 1923. File No. 29445.

O

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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA, appellant, *v.* TOMMY PAYNE. | No. 240.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

In October, 1920, Tommy Payne, a Quileute Indian, instituted suit in the United States District Court for the western district of Washington to establish and have judicially declared his right to an allotment of a tract of 80 acres within the Quinaielt Indian Reservation in the State of Washington.

Authority for such a suit is derived from the Act of August 15, 1894, c. 290, 28 Stat. 305, as amended by the Act of February 6, 1901, c. 217, 31 Stat. 760, which provides:

> That all persons who are in whole or in part of Indian blood or descent who are entitled to

> an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper circuit court of the United States; and said circuit courts are hereby given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, . . .

His bill of complaint alleged that he is a full-blood Indian of the Quileute Tribe, and has since birth resided upon the *Quileute* Reservation; that under the treaty entered into between the United States and the Quileute and other bands of Indians, and under the "allotting acts of the United States" he is entitled to an allotment of at least 80 acres of land upon the *Quinaielt* Reservation; that about nine

years previously he had selected a tract of 80 acres on that reservation as an allotment but the defendant, the United States, its officers and agents, have neglected and refused to allot the land to him and have excluded him from it. (R. 1–4.)

To this bill of complaint the United States made answer denying the allegations and setting up affirmatively (Par. II, R. 6) that the land "is not such land as is or would be available for agricultural or grazing purposes, but is heavily timbered and timbered to such an extent that the timber value thereof greatly exceeds the value of said land for agricultural or grazing purposes."

To this affirmative part of the answer plaintiff demurred on the ground that it did not constitute a defense. (R. 7, 8.) The demurrer was sustained as to this defense, but "on account of the broad denials of the answer, the demurrer to the answer as a whole is overruled." (R. 14; opinion R. 8 *et seq.*)

The case was tried to the court, which made findings of fact and conclusions of law. (R. 19–23.) The facts found were substantially those set forth in the bill of complaint. The court entered a decree declaring Payne entitled to the lands selected by him, and commanding the United States to issue a certificate of allotment to him for this land and to refrain from asserting or claiming that he was not entitled thereto, with full right to use, occupy and improve the same. (R. 17–19.) Memorandum opinion on merits, R. 15–17.

An appeal was taken to the Circuit Court of Appeals for the Ninth Circuit, which affirmed the decree. (R. 60.) Opinion (R. 58–60), 284 Fed. 827. The further appeal of the United States brings the case to this court.

ASSIGNMENT OF ERRORS.

The assignment of errors (R. 62, 63) challenges the correctness of the judgment of the Circuit Court of Appeals in the following particulars:

1. In affirming the action of the District Court in sustaining the demurrer to that part of the answer which asserted that the land involved was not agricultural or grazing but heavily timbered.

2. In affirming the District Court's finding that the land selected by Payne was subject to allotment and that the officers and agents of the United States have wrongfully neglected and refused to allow application for allotment.

3. In sustaining the decree of the District Court which adjudged Payne entitled to have the land allotted to him, to occupy and enjoy the same, and which enjoined the defendant from interfering with Payne's possession thereof.

Under this assignment we present these propositions:

1. The land selected was not subject to allotment.

2. The discretion vested in the President by the applicable law was not exhausted by the survey of the lands within the reservation.

3. The interests of the Quileute Tribe as a whole are not to be subordinated to the interest or claim of an individual member.

ARGUMENT.

I.

The land selected was not subject to allotment.

This case turns upon the question whether the land sought to be acquired by Payne was subject to allotment. Corollary to that is the question of the extent of the Secretary's power and discretion in respect to allotting lands to Indians. There is no dispute as to Payne's status as an Indian or as to his right to an allotment of such lands as are subject to allotment under the applicable laws.

In the consideration of the case attention must be given to the treaty with the Quileutes and Quinaielts and to the general allotment act of February 8, 1887.

By Article I of the treaty of July 1, 1855, 12 Stat. 971, those two tribes ceded to the United States all right in the country then occupied by them.

By Article II the United States agreed to reserve for the use and occupation of the tribes a tract or tracts sufficient for their wants within the Territory of Washington.

Article VI provided that the President might thereafter in his discretion remove these Indians from said reservation or reservations to such other suitable place within the Territory as he deemed fit, on remunerating them for their improvements, or he might consolidate them with other friendly tribes. It further provided:

> And he may further, at his discretion, cause the whole or any portion of the lands to be reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable.

The sixth article of the treaty with the Omahas, so far as is material, is as follows (10 Stat. 1043, 1044):

> The President may, from time to time, at his discretion, cause the whole or such portion of the land hereby reserved, as he may think proper, or of such other land as may be selected in lieu thereof, as provided for in article first, to be surveyed into lots, and to assign to such Indian or Indians of said tribe as are willing to avail of the privilege, and who will locate on the same as a permanent home, if a single person over twenty-one years of age, one-eighth of a section; to each family of two, one-quarter section; to each family of three and not exceeding five, one-half section; to each family of six and not exceeding ten, one section; and to each family over ten in number, one-quarter section for every additional five members.

Section 1 of the General Allotment Act of February 8, 1887, c. 119, 24 Stat. 388, as amended by the Act of February 28, 1891, c. 383, 26 Stat. 794, and the Act of June 25, 1910, c. 431, 36 Stat. 859, 860, reads:

> That in all cases where any tribe or band of Indians has been or shall hereafter be located upon any reservation created for their use by treaty stipulation, Act of Congress, or executive order, the President shall be authorized to cause the same or any part thereof *to be surveyed or resurveyed whenever in his opinion such reservation or any part thereof may be advantageously utilized for agricultural or grazing purposes* by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian. . . . (Italics supplied.)

It will be observed that Article VI of the treaty with the Quileutes and Quinaielts in authorizing allotments does not specify the character of the land which may be taken. Neither does Article VI of the treaty with the Omahas, which apparently was referred to in the other treaty mainly to give specification as to the areas to be allotted and as to the way title was to be acquired.

The General Allotment Act is definite in prescribing the kind and character of land which may be allotted. It is *agricultural* or *grazing*.

The question is thus narrowed to a determination of whether the land sought to be acquired comes within the scope of the term agricultural or grazing as used in the allotment act.

Upon this point the evidence adduced is that this land lies along the Raft River; about 30 acres imme-

diately on the river is bottom land with clay soil, 50 acres back of that is heavily timbered; the timber is valued at $3,900; the land without the timber at $400.

There is little, if any, dispute as to the facts. At any rate both courts below proceeded upon the theory that the land was more valuable for the timber than for agriculture or grazing. This is clear from the opinion of the District Court (R. 13) where, speaking of the authority given the President under the General Allotment act, *supra*, it was said:

> No right is given . . . to refuse an allotment of selected, surveyed land because the lands are more valuable for timber than agriculture or grazing.

And the opinion of the Circuit Court of Appeals (R. 59) where this statement occurs:

> The question before us is whether, under the cited act of Congress of 1887, the land Payne selected should be excluded from allotment because it is in part heavily timbered and until cleared is doubtless more valuable for timber than for agriculture or grazing.

It is difficult to determine exactly the basis upon which the courts below rested their judgments, whether upon a construction of the treaty or upon an interpretation of the General Allotment Act, or upon both.

The District Court, in sustaining the demurrer to that part of the answer setting up that the land was not subject to allotment because timbered, based

its action entirely upon a construction of the allotment act. Opinion, R. 12, 13. However, its memorandum decision on the merits (R. 15, 17) is wholly devoted to a discussion of equitable considerations arising out of the terms of the treaty and which the court thought justified a judgment for the allotment of the land to Payne.

The Circuit Court of Appeals said that it did not regard the allotment act as so limiting the authority of the President that he might not order allotments of lands included in the reservation (R. 59). The opinion indicates that timbered land might be allotted, and that is the apparent basis of the judgment. However, it is clear that the judgments of the courts below were not based upon a finding that the land was agricultural or grazing.

If the conclusion was based upon a construction of the General Allotment Act, we assert that it totally ignores the plain language of that act, which provides that allotments may be made of land which in the opinion of the President "may be advantageously utilized for agricultural or grazing purposes." To hold that timbered lands may be allotted under this act is equivalent to saying: Timbered lands within an Indian reservation become, when surveyed, suitable for agriculture or grazing.

It becomes pertinent at this point to consider whether the treaty provisions respecting allotments have any force or effect, or whether the General Allotment Act supersedes them.

In terms section 1 of the allotment act covers this reservation, for the allotments therein provided for are of lands reserved for tribes or bands of Indians, "by treaty stipulation, act of Congress, or executive order."

There can be no dispute that the purpose of the act was to break up tribal relations, place the individual Indian upon his own resources in a limited way, secure his attachment to a particular tract of land as a home, thereby turning him to occupations which would cure him of his nomadic habits.

The act was broad and comprehensive and designed, as we view it, to inaugurate a new method of allotments in severalty superseding all prior enactments or treaties.

Specifically in this case, it superseded the treaty of July 1, 1855.

The view of the Interior Department in allotting reservation lands, since the allotment act became effective in 1887, has been that that act governed and superseded treaty provisions in this particular matter.

This construction, having been followed for so many years, is entitled to great respect and ought not to be overturned except for cogent reasons. *LaRoque* v. *United States*, 239 U. S. 62, 64; *Harris* v. *Bell*, 254 U. S. 103, 109; *McLaren* v. *Fleischer*, 256 U. S. 477, 481.

Again, that department has never considered the Omaha treaty provisions for allotments as practicable

or workable for this particular reservation, because the character of the two localities was vastly dissimilar, and the characteristics, habits, and mode of living of the Omahas were radically different from the Quileutes and the associated tribes.

That the Omaha treaty relative to allotments was unsuited to these Indians is clearly demonstrated by the fact that not a single allotment was made on this reservation until after the General Allotment Act was passed, more than thirty years after the treaty, and then when the allotments were made they were made pursuant to the provisions of that act.

But whether the General Allotment Act superseded in general treaty provisions for allotments, we contend that in respect to Tommy Payne, appellee here, any allotment made to him must be pursuant to the terms of that act.

We base this contention upon the Act of March 4, 1911, c. 246, 36 Stat. 1345, which is as follows:

> That the Secretary of the Interior be, and he is hereby, authorized and directed to make allotments on the Quinaielt Reservation, Washington, under the provisions of the allotment laws of the United States, to all members of the Hoh, Quileute, Ozette or other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute Tribes in the treaty of July first, eighteen hundred and fifty-five, and January twenty-third, eighteen hundred and fifty-six, and who may elect to take allotments on the Quinaielt Reservation rather than on the reservations set aside for

> these tribes: *Provided*, That the allotments authorized herein shall be made from the surplus lands on the Quinaielt Reservation after the allotments to the Indians thereon have been completed.

The reason for and purpose of this act are indicated by a letter of the Secretary of the Interior dated February 18, 1910, which was made a part of the report of the House Committee to which the bill was referred. It reads in part:

> By executive order of November 4, 1873, in pursuance of the treaty of July 1, 1855 (12 Stat. L. 971), there was set aside and reserved for the use of the Quinaielt, Quileute, Hoh, and other tribes of fish-eating Indians of Washington, approximately 220,000 acres of land.
>
> Article II of the treaty of 1855, supra, provided that it would be lawful for the members of the several tribes to reside upon any land not in the actual claim and possession of citizens of the United States for a period of one year pending their removal to the diminished reservation. The diminished reservation was not established until 1873, and a number of the Indians who had not removed thereto at that time continued to live on tracts outside of the reservation even after it was established.
>
> To protect these Indians in their holdings off the reservation, executive orders of February 19, 1889, and April 12 and September 11, 1893, set aside and reserved approximately 1 square mile each for the Quileute, Ozette, and

> Hoh tribes, respectively. These small reservations are and have been occupied by the Indians in the form of villages and do not contain enough lands to provide allotments for all the Indians thereon. Members of these tribes who moved to and resided continuously on the Quinaielt reservation were entitled to and received allotments there.
>
> The department is of the opinion, therefore, that those members of the Hoh, Ozette, and Quileute tribes who are residing on the separate reservations set aside for them should receive allotments on the Quinaielt reservation, and would be glad to see Senate bill 5269 enacted into law.
>
> House Rep. No. 2152, 61st Cong., 3rd sess.

Tommy Payne is one of the Indians thus legislated for as is shown by his testimony in this case, wherein he states (R. 34):

> That he is a full-blooded Indian of the Quileute tribe, born and raised on the Quileute reservation, and now fifty-five years of age. He has a family consisting of a wife and five children.
>
> That the Quileute reservation is about one mile square, and about two hundred Indians live on it.

Thus it will be seen that the treaty provisions become immaterial in the determination of this particular case, since this last act provides that allotments shall be made under the provisions of the allotments laws of the United States. We have, however, discussed the general effect of the allotment

act for the reason that the Interior Department has, as we have already pointed out, construed it as the sole guide in allotting reservation Indians and would welcome a decision of this court upon that point, so that the matter may be set at rest. In this connection we may say that other suits are pending of which this case may be determinative, if this broader question is decided.

II.

The discretion vested in the President by the applicable law was not exhausted by the survey of the lands within the reservation.

The courts below placed great stress upon the fact that the lands involved as well as other lands within this reservation had been surveyed. This was held to be a decision or finding by the President that the lands were subject to allotment because section 1 of the allotment act provides with respect to reservations that:

> The President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed *whenever in his opinion such reservation or any part thereof may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made* in such areas as in his opinion may be for their best interest. . . . (Italics supplied.)

It seems to us to be a strained construction of the statute to say that the order for survey or the survey itself constituted a final finding that *all* the land ordered to be surveyed was of the character specified as allottable.

Suppose three-fourths of the lands contained in an Indian reservation were agricultural or grazing in character, the other fourth timbered lands, and it was desired to allot the agricultural or grazing lands. Under the construction given the act by the lower courts, the executive would be compelled to limit the survey to three-fourths of the land and leave the one-fourth unsurveyed; if the timbered lands were in the center of the reservation the survey order must exclude them, otherwise they would become subject to allotment.

To say that a survey of a reservation must be made piecemeal or in fragments, and that no land may be surveyed without rendering it available for allotment even though it be not of a character specified in the act as susceptible of allotment, is to give the statute an absurd interpretation. Not only would such fragmentary surveys be unbusinesslike and at total variance with established methods of executing public land surveys, but the result would be confusing. Imagine a survey which would leave a township with the middle tiers of sections unsurveyed or one side of the township out.

Certainly the act did not contemplate that the order for survey would exhaust the power of the President or be a final decision that *all* the lands were of the character subject to allotment. The contrary construction in our judgment fails to give due weight to the words "and to cause allotment" which follow rather closely the language giving authority to survey. The authority is to "cause

. . . to be surveyed or resurveyed . . . *and* to cause allotment . . . to be made."

The survey is a necessary preliminary to allotment so that the lands may be definitely identified and located, and while it may well be said that the President's authority to cause surveys to be made is to be predicated upon a determination that the lands in a reservation, considered as a whole, are such as may be advantageously utilized for agricultural or grazing purposes, it does not follow that it is a finding that *all* the lands are allottable. Indeed, there would be practical difficulties in framing an order for a survey which would definitely describe the agricultural or grazing lands and eliminate the timbered lands. In most cases the order could be given only in general terms as for the survey of the agricultural or grazing lands. That would make the surveyor the judge of the character of the lands. Such an order could not in reason be held to be a determination as to what particular lands were agricultural or grazing, for they could not be definitely identified. That question would necessarily have to be decided after survey when the lands could be specifically described and segregated.

We are informed that, as a practical matter, surveys are made of Indian reservations in advance of a determination of the character of the lands. This action is justified by the Interior Department upon the ground that it is the expedient and sound procedure from the standpoint of good administration as well as warranted by the act, giving the

words "and to cause allotment to be made" equal force with the words "cause . . . to be surveyed."

But further, if as was held below an order for survey, or the survey of lands, exhausted the President's power with respect to a final determination of their character, then the executive is powerless to prevent allotments to qualified Indians, even though the order for survey was made improvidently or under a misapprehension of the true situation or as the result of misrepresentation.

Surely no such construction should be placed upon the act nor should the President's power be so limited. Compare *Kirk* v. *Olson*, 245 U. S. 225; *Johnson* v. *Payne*, 253 U. S. 209.

Reliance was placed upon the case of *United States* v. *Fairbanks*, 171 Fed. 337, and *Leecy* v. *United States*, 190 Fed. 289. These cases do not give support to the view taken below.

While the Circuit Court of Appeals in the *Fairbanks* case did cast doubt upon the power of the Secretary of the Interior to exclude timber lands from allotment (p. 340), yet the case was not decided upon that point for it became immaterial because subsequent legislation had made such land subject to allotment. When the case was considered by this court, *Fairbanks* v. *United States*, 223 U. S. 215, the question of the power of the Secretary in that respect was not passed upon, nor did the court say that it shared the doubt entertained by the Court of Appeals. It is important to note that in referring

to the power of the President under section 1 of the allotment act the Circuit Court of Appeals said (p. 339):

> The evidence in this case does not show the date of the order of the President directing that allotments be made under this statute. In our judgment, however, the making of one order did not exhaust the powers of the President. The statute vests a continuing power, and he could provide from time to time for allotments in favor of those born upon the reservation subsequent to the first order dealing with the subject, so long as there were lands of the reservation which had not been allotted. The statute submits the whole subject of the distribution of the lands embraced in the reservation, to the President, acting through the Interior Department.

Leecy v. *United States* was a case where the Secretary declined to allot a tract because it had been withdrawn as a sawmill reserve. The question presented was the power of the Secretary to make that withdrawal and it was held he did not have such power. The force of this decision is, however, much weakened by a later decision of the same court in *Gravelle* v. *United States*, 253 Fed. 549, which upheld the action of the Secretary in withdrawing from allotment lands which he deemed essential for an agency farm and pasture.

III.

The interests of the Quileute tribe as a whole are not to be subordinated to the interest or claim of an individual member.

The question presented under this point is the relative rights of the tribe and the individual member of it.

In declining to allot this land to Payne, the Interior Department is not proceeding in an arbitrary manner disregarding the rights or welfare of Payne, or discriminating against him. On the contrary, the Secretary of the Interior has in view the welfare of the tribe. The Secretary is proposing and has been negotiating a sale of all the timber on the unallotted lands. The proceeds of the sale will be distributed among the members of the tribe. Payne will receive his just share of that and then doubtless can also have an allotment of land. So it is clear that this is not a case of denying Payne an allotment of land and then giving it to some one else.

The Secretary in his administration of Indian affairs is not confined to a consideration of the welfare of the individual Indian alone—he is of course concerned about that—but he should and it is his duty to consider the welfare and interest of the Indians as a tribe. He is doing so in the instant case.

The District Court seemed to have gained an impression that discrimination was being practiced, for its opinion on the merits concludes (R. 17):

> No explanation is given of why allotments should have been made to the Quinaielt Indians, under substantially the same conditions, and allotments refused the plaintiff and other Quileutes.

Now the fact is that the official records of the Interior Department show that members of both tribes have received allotments on this reservation; that scores of allotment selections made by members of the Quinaielt tribe have been rejected for the same reason that Payne's application was denied.

When allotting operations were started on the reservation some fifteen years ago, the instructions to the allotting agent were to allot lands that could be used for agricultural or grazing purposes, and every allotment that has been approved received approval upon the assumption that it embraced land of that character.

After nearly seven hundred allotments had been approved it was discovered that some allotments were for lands chiefly valuable for timber. In consequence the allotment work was stopped and no allotments on this reservation have been approved since October 27, 1910, for the reason that practically all remaining unallotted lands have been regarded as timber lands.

Furthermore, if Payne should secure this allotment containing timber of the value of $3,900, he would gain an advantage over others who have secured only agricultural land or land containing but a small amount of timber. So that the equities are not all

on his side. The Secretary is seeking to make such disposition of the timber as will result in benefit to all the tribe and not to the few who may secure these timbered lands.

The District Court seems to have had the impression that the Indian was being unjustly dealt with. This is indicated by the statement (R. 16) that "in exchange for a vast and rich heritage of lands released by the Indians, the government reserved for them a small parcel of land in a remote wilderness."

The Court of Appeals seemed to have been impressed likewise, for in justification of its conclusion it said (R. 60):

> The construction outlined seems specially fair in the case of the Quileute Indians, who gave up a large area under assurances that they would have a reservation in the heavily-timbered wilderness selected by them and the other makers of the treaty.

While not particularly important, we think in the interest of accuracy attention should be drawn to the fact that under Article IV of the Treaty the Indians were to be paid $25,000 for the cession of their lands. This was additional to a reservation of other lands as provided in Article II to be set aside for them. It was not, as the courts below seemed to have thought, a bare exchange of land for land. Further, the United States agreed to pay $2,500 to enable the Indians to remove to the new reservation and to clear, fence, and break the land (Article V);

it agreed to support for twenty years an agricultural and industrial school to be open to the children of these tribes; also to furnish medical attendance (Article X).

CONCLUSION.

The judgment of the Circuit Court of Appeals was erroneous and should be reversed.

JAMES M. BECK,
Solicitor General.

H. L. UNDERWOOD,
Special Assistant to the Attorney General.

FEBRUARY, 1924.

O

No. 360

In the

Supreme Court of the United States

October Term, 1923

THE UNITED STATES OF AMERICA,
Appellant,

v.

TOMMY PAYNE,
Appellee.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit

Brief of Appellee

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No. 240

In the

Supreme Court of the United States

OCTOBER TERM, 1923

THE UNITED STATES OF AMERICA,
Appellant,

v.

TOMMY PAYNE, *Appellee.*

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit

Brief of Tommy Payne

The sole question at issue is whether appellee Tommy Payne, a full blood Quileute Indian, is entitled to an allotment land of eighty acres heretofore selected by him upon the Quinault Indian reservation which reservation was selected and set

apart for the "sole and exclusive use" of the Quileute and Quinaielt tribes of Indians. Appellant's officers attempt to justify their action in excluding appellee from the land selected by him upon a reservation set apart for his and a neighboring tribe solely upon the ground that the land selected is now more valuable for timber growing upon it than for agricultural or grazing purposes.

(Italics and capitals herein are ours.)

The treaty between the Quileute and Quinaielt Indians with the United States in July, 1895, and January, 1896 (12 Stat. 971), provides in part as follows: "There shall however be reserved for the use and occupation of the tribes and bands aforesaid a tract *or tracts* of land sufficient for their wants within the Territory of Washington *to be selected by the President* of the United States and hereafter surveyed or located *and set apart for their exclusive use.*" Art. 5 provides in part as follows: "To enable the said Indians to remove to and settle upon such reservations *as may be selected* for them by the President and to *clear*, fence and break up a sufficient quantity of land for cultivation, the United States further agrees to pay the sum of two thousand five hundred $2,500) dollars." Art. 6 provides in part, "And he (the President) may further at his discretion cause the whole or any portion of the lands to be

reserved, or such other land as may be selected in lieu thereof to be surveyed into lots and assign the same to such individuals or families as are willing to avail themselves of the privilege and will locate on the same *as a permanent home* on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be practicable."

The sixth article of the Omaha treaty referred to (10 Stat. 1043) provides for allotments in severalty to a single person over twenty-one years of age, eighty acres; to each family of two, one hundred and sixty acres; to a family of six, one section, etc."

In addition to the treaty stipulations Congress passed the general alloting acts, with amendments as set out in appellant's brief, and in addition thereto on March 4, 1911, passed the special act directing that these Indians be given allotments on this particular reservation (Stat. 36-1345). This special statute which superceded other acts if any inconsistent with it, provides:

"That the Secretary of the Interior be and he hereby is authorized and *directed* to make allotments on the Quinaielt reservation, Washington, under the provisions of the allotment law of the United States to *all* members of the Hoh, Quileute,

Ozette or other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute tribes in the treaty of July first eighteen hundred and fifty-five, and January twenty-third, eighteen hundred and fifty-six, and who may elect to take allotments on the Quinaielt Reservation, rather than on the reservations set aside for these tribes; provided, That the allotments authorized herein shall be made from the surplus lands on the Quinaielt reservation after the allotments to the Indians thereon have been completed."

The letter of the Secretary set forth in appellant's brief, although outside the record, is not objected to by appellee, who requests that it be considered. It shows the conditions existing at the time the bill was pending and shows conclusively that the Secretary then considered that the Quileute Indians who had moved to, and resided upon the one mile reservations were entitled to allotments on the large reservation of two hundred and twenty thousand acres.

Appellee is one of the two hundred Quileute Indians residing on a one mile square reservation at La Push, near the mouth of the Quileute river. (R. 34.)

Appellee contends:

a. That he is entitled to the land selected by him regardless of what may be its value or character.

b. That he is entitled to it regardless of relative value for agriculture and timber.

c. That the undisputed evidence is that all or a large portion of it is agricultural land.

d. That two courts have passed upon the facts, adjudged them adversely to appellant and this court will not therefore re-examine the facts.

In an equity case where it is sought by a guardian to deprive its ward of the right to an allotment of land upon a reservation reserved for the "exclusive use" of his tribe, it would be expected that some cogent reason would be presented to justfiy such action or that some or many legal justifications would be presented. This should be true when the policy of the government for many years has been to encourage the Indians to abandon tribal relations to take up agricultural pursuits and to build homes for themselves and their families.

Appellant's brief advances no equity, why appellee is not entitled to the land, neither does it cite any authority in law to support its most unusual action in excluding appellee from land lawfully selected, by him in the usual manner; land to which appellant and no person asserts or has ever asserted any adverse claim.

APPELLEE IS ENTITLED TO THE LAND REGARDLESS OF CHARACTER OR VALUE

1st. Because of treaty stipulations.

2nd. Under the general laws providing for allotments to Indians.

3rd. By virtue of the special Act of Mar. 4, 1911, directing the allotment to be made.

The President exercised his discretion to have the lands surveyed and allotted and a special alloting agent, Frank Archer, was sent to this reservation to make the allotments. (R. 34.)

The record does not show just when this occurred but it was probably shortly after the special act was passed *directing* that these Indians be allotted.

Appellee selected the land with the aid of Mr. Archer's assistant. "They showed plaintiff maps and locations of where there was good lands for agricultural purposes; that is how he got this." (R. 34.) Having selected the land in the usual and lawful manner from the alloting agent specially appointed by the United States for the purpose and having his selection properly noted (R. 34, 35), he has done everything necessary or required and is

entitled to the allotment from the date of its selection regardless of its character or value.

The decision of the Circuit Court of Appeals in *Leecy v. U. S.*, 190 Fed. 289, is on all fours with this case. The appeal of that case was dismissed upon motion of the Attorney General in the supreme court, 232 U. S. 732, 58 L. Ed. 818. In that case a section of land, part of the Mille Lac Indian reservation, was withdrawn by order of the Secretary of the Interior from allotment in order that the timber upon it could be cut, the lumber to be used to build houses for the Indians. Thereafter Mrs. Leecy selected a part of the land so withdrawn for an aditional allotment. The circuit court decided the Secretary's action in withdrawing the land until the timber could be removed was without authority of law and invalid. At page 292 the court says:

"Congress authorized the allotment of these lands, and if the Secretary of the Interior could under his authority withdraw a portion of them from allotment, he could withdraw substantially all of them if that seemed in his judgment best, and under the contention of the government he would be executing an allotment law under rules and regulations prescribed, when in fact he nullified the law by withdrawing the very lands from allotment which ongress had authorized to be so

distributed. The law was to be executed under, not nullified by, rules and regulations. The power to withdraw the land in question cannot be found in the provision that allotments should be certified by the Secretary of the Interior for his action in the one providing for his approval of allotments before patent."

Referring to the Act under which that and this suit are brought, the court says (p. 293):

"It is manifest that no Indian would have occasion to seek relief under this statute until his right had been denied by the Interior Department. It is certain that the purpose of this statute was to confer substantial rights upon Indian claimants, and yet it is insisted that as allotments must be reported to the Secretary of the Interior for his approval the absence of his approval would defeat the suit, when of course no one would want to bring a suit if he had that approval. * * * A strong argument is made tending to show that power should be vested in the President or some other officer of the Government to withhold from allotment lands specially needed for the use of the trible as a whole, but such argument should be addressed to Congress rather than to the courts. If such a law would be wise that is no reason why an executive department should make one, or the courts sustain it in doing so."

"It is true that the Secretary of the Interior may prescribe reasonable rules and regulations not inconsistent with or contrary to the law of Congress

under which allotments shall be made; but this does not authorize him to withhold an allotment altogether from one shown by the rolls to be entitled thereo. Morrill v. Jones, 106 U. S. 466, 27 L. ed. 267; Quinn v. Chapman, 111 U. S. 445, 28 L. Ed. 476; United States v. Symonds, 120 U. S. 46, 30 L. Ed. 557; Hartman v. Warren, 76 Fed. 157; Leecy v. U. S., 190 Fed. 289. The enrollment within the time required and as of the date fixed determines the right of the citizen to an allotment *and the failure beyond a reasonable time* after its approval by the Secretary of the Interior to make the allotment and issue the proper evidence thereof can not operate to deprive him of the right thereto."

Henry Gas. Co. v. United States, 191 Fed. 132.

In *St. Louis Ind. Pack. Co. v. Houston*, 215 Fed. 559, the *Leecy* case is cited with approval. The court says:

"It is within the power of Congress to vest in executive officers the power to promulgate administrative rules, but this never is deemed to extend to the making of rules to subvert the statute."

See:

Ballinger v. U. S., 216 U. S. 240, 54 L. Ed. 464.

Wood v. Gleason, 140 Pac. 418.

Garfield v. Goldsby, 211 U. S. 249, 53 L. Ed. 168.

In the case of *United States v. Paine Lumber Co.*, 206 U. S. 467, 51 L. Ed. 1139, the decision of the Circuit Court which hold the Munsee Indians had the right to cut and sell timber from allotments for which no patents had been issued, was affirmed.

From the adjudicated cases it would seem the refusal to allot land upon which merchantable timber is growing is an attempted innovation, wholly without law or precedent. Appellant's brief fails to point out, and appellee does not know why or under what authority he is excluded for years from lands sorely needed for a home.

In *Bonnifer v. Smith*, 166 Fed. 846, it was held rights to an allotment dated from the time selection is made. In the same case in the lower court, 154 Fed. 883, it was held that all the Indians are entitled to participate in allotments.

See, also, *Oaks v. U. S.*, 172 Fed. 305.

The lands embraced in this reservation were not designated in the treaty but were provided for. The tract was designated later and set apart by an executive order. The Indians presumably had nothing to say or do in selecting it. It would seem this is a proper case to apply the rule of estoppel, that a guardian having made a selection of land for its

wards for their homes, is estopped in equity from asserting that the very land it selected for them and their use is not suitable for the purpose for which appellant selected it.

Appellee has found no decision which in any way tends to support appellant's contention that the Secretary of the Interior can upon any pretext exclude an Indian from an allotment of lands selected in the usual way upon a reservation set apart for his tribe surveyed and opened for allotment. Appellant has cited none. The case of *Gravelle v. United States*, 253 Fed. 549, is not in point as the land claimed in that case had previously been reserved for school and agency purposes for the benefit of the tribe.

The treaty, general allotting laws and special act contain no clause of limitation, as to the existence or value of land or timber, and no such limitation should be read into them. The special act, which being the latest and applying to this reservation only, must be held to control, and it makes no reference whatever to agricultural or grazing land, but directs the allotments to be made of land pracically all of which is now more valuable for timber than for agriculture. (R. 42.)

The treaty (12 Stat. 971), article 5, provides:

"To enable the said Indians to remove to and settle upon such reservation as may be selected for them by the President, and to *clear*, fence and break up a sufficient quantity of land for cultivation, the United States agrees further to pay the sum of two thousand five hundred dollars to be laid out and expended under direction of the President. * *"

This is a clear recognition that the land was timbered to some extent at least, and must, to be available for cultivation, be cleared. Note the word "*clear*" is used before "fence" and "break up." Note also it was clearly intended the Indians were to "*remove to* and *settle upon*" the reservation. Instead of paying money to help the Indians "remove to and settle upon" and "to clear" a quantity of the land, they have, as admitted by the answer filed, been excluded from the land by appellant (R. 36), and prohibited from being permitted to themselves clear a quantity "sufficient for cultivation."

The court will take judicial notice that the portion of Washington lying west of the summit of the Cascade Mountains is noted as being heavily timbered, and that this reservation borders on the Pacific in that district. See, also, statement of agent at Tahola on the reservation (R. 42): "Very few allotments (already made) on this reservation on

which the timber is not greated in excess of any value that can be accredited to the land."

THE UNDISPUTED EVIDENCE IS THAT THE LAND IS VALUABLE FOR AGRICULTURAL AND GRAZING PURPOSES

Appellee after testifying that his father Tah-ah-ha-whtl, was one of the Quilleutes who signed the treaty (R. 34), testified through an interpreter (R. 34): "The selection was made through Mr. Archer, at that time alloting agent of the Government. Mr. Archer instructed his assistant to go and see the plaintiff, together with the rest of the people that were entitled to allotments at the time, and *they showed the plaintiff maps and locations of where there was good lands for agricultural purposes;* that is how he got this." (R. 35.) "About one-half of the land is heavily timbered with cedar and hemlock and the remainder, bottom land, with clay soil. The character of the land is very similar to all the lands along the Raft and Queets River, which is mostly bottom land, clay soil. Part of the land is open along the bottom. That if the timber were removed it would make good agricultural land." (R. 36.) "That plaintiff feels sure he can support his family if given the right to that land;

that both white people and Indians along the Queets River are making a good living today out of their farms along the river, and the Queets River is about six miles from the land plaintiff selected."

Appellee further testified (R. 36), that he was seeking the allotment for himself to hold permanently; that he had (R. 34) a wife and five small children to support. * * * (R. 35.) "That it is necessary now that the Indians should have agricultural lands in order to support their families on account of their fish getting played out, and the seal hunting getting very poor and all other things along the river where they used to make their living has got so that they are restricted from getting the fish and making their living, which is why it is necessary for them to all move over on their allotment. * * * * That plaintiff has supported his family on fishing and seal hunting but those things are played out, and in a few years they do not know what they are going to do. That the Indians used to hunt sea otter years ago but that is all gone. These big purse seine companies have gotten so thick now that the Indians' fish * * * are pretty nearly all destroyed, and the white people have fished out the Quileute River that runs down by their reservation.

Joe Pullen, a Quileute Indian, testified (R. 37): "The locality where Tommy Payne has made his selection was partly bottom land and fit for agricultural purposes in some places, but a little further in it is kind of heavy timber, pretty hard to clear, but not what you would call timber land. * * * * That the soil is clay soil and the portion where it is most heavily timbered would be good for grazing or agriculture with the timber removed. That the land is not all bottom land but brush land. * * * Part of the land is as brushy, about one-third of the tract as fit for agriculture, and the timbered area as containing some merchantable timber."

Jack Ward, another Quileute Indian, testified (R. 38): "That the land is the same as around the Queets country, where the farmers live; that he would say pretty near one-half of the selection was good for agricultural land and the other half toward the hill is timber and if the timber were removed would be about the right kind of land for agriculture and grazing. That he should judge about 30 acres of this selection is open like, brushy, and the other fifty is where the timber lies. * * * On the Queets River there are about eight Indian families and right across the river there are over twenty white families. That one farmer living

right across from the Indian farms (R. 39), has about 40 head of cattle and has cleared about 60 acres of his ranch, and the land in the Raft River territory, including the land Mr. Payne selected, *is as good* and *of the same character.*"

Appellant's evidence (R. 40), is that "about 30 acres of the land consists of *fairly rich bottom which if cleared makes good farm land.* The balance (50 acres) consists of rolly bench and hill slope to the higher land back from the river, and would, if cleared, *make grazing* and *possibly* farm land."

Appellee contends that there is no dispute as to the evidence, which is conclusive that about 30 acres, a tract in itself amply sufficient for immediate needs, is good bottom land covered with brush, easily cleared, and the remainder land which when cleared will be valuable for grazing and pasture at least, and possibly farming as well. This being true, what matters it that a portion is more valuable for timber. So would be all of the lands of western Washington which once had a fair amount of timber, if the timber had been permitted to stand until now, but it was cut down and made into lumber and the land now supports nearly three-fourths of a million inhabitants.

When was it ever decided that an executive officer could disregard treaty stipulations, rights conferred by general statutes, and express directions of a special statute, under any similar facts?

The Secretary is excluding appellee from substantial rights, disregarding a direction to allot, refusing to act and perform his duty, under a pretext of performing a duty.

TWO COURTS HAVE PASSED UPON THE FACTS WHICH AS TO THE CHARACTER OF THE LAND ARE UNDISPUTED, AND THIS COURT WILL NOT REEXAMINE THE FACTS WHICH ARE DECISIVE, BUT WILL AFFIRM THE DECREE

Palmerlee vs. Chicago, Milwaukee & St. Paul Ry., 246 U. S. 659.

Chicago Junction Ry. Co. v. King, 222 U. S. 222, 56 L. Ed. 173.

Great Northern Ry. Co. v. Knapp, 240 U. S. 464, 60 L. Ed. 745.

Baltimore & Ohio Ry. Co. v. Whitacre, 242 U. S. 169, 61 L. Ed. 228.

The late General Hazard Stevens, who was secretary for his father, Isaac I. Stevens, at the making of the treaties with the Indians of Washington Territory, in his history of his father, at page 463, quotes Governor Stevens' promises to the Indians when one of the treaties was made, as follows:

"We want to place you in homes where you can cultivate the soil, raising potatoes and other articles of food, and where you may be able to pass in canoes over the waters of the Sound. * * * The Great Father desires this, and this is why I am able to say this, the Great Father thinks you ought to have homes and he wants you to have a school. Those white children have always told you you would be paid for your lands, and we are here now to buy them."

At the Point No Point treaty he told them, volume 1, page 469: "The Great Father wants you and the Whites to be friends; he wants you to have a houes of your own, to have a school where your children can learn. He wants you to learn to farm, to learn to use tools, * * *. This you will have all the time, and *when the paper comes from the Great Father, then you will have your own* houses and homes and schools."

At page 472: "The Governor addressed them, pointing out *that the treaty gave them all those things* that a father would give his children, as homes, schools, medicines and a doctor."

At the Medicine Creek Treaty (page 458), Governor Stevens told them: "You will have certain lands set apart for your homes."

It is reasonable to suppose the same or similar promises were made to the Quileutes at the time their treaty was negotiated. The treaty was interpreted to these Indians in Chinook jargon, a very imperfect means of communicating any but the most simple transactions and thoughts.

In the case of *Seufert Bros. Co. v. U. S.*, 249 U. S. 194, 63 L. Ed. 555, the Supreme Court quoted with approval from *United States v. Winans*, 198 U. S. 371, 49 L. Ed. 1089, as follows:

"We will construe a treaty with the Indians as 'that unlettered people' understood it, and as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection, 'and counterpoise the inequality' by the superior justice which looks only to substance of the right without regard to technical rules. Choctaw Nation v. U. S., 119 U. S. 1, 30 L. Ed. 306; Jones v. Meehan, 175 U. S. 1, 44 L. Ed. 49."

Referring to the Kansas Indians, 72 U. S. 737, 18 L. Ed. 667, the Supreme Court said:

"If they have outlived many things they have not outlived the protection afforded by the Constitution, treaties and laws of Congress."

Viewing the sixth article of the treaty with this light of this reliable history there can be no doubt

that the Indians understood the word "may" as "will," in the sixth article, and that it was a positive promise that lands *would* be assigned them sufficient for their homes and needs.

It is pertinent to ask why was an provision made in the treaty or statute for allotments at all, if the reservation selected was all timbered and timber land was not to be allotted.

It would seem this is a proper case to apply the rule announced in *Choctaw Nation v. U. S., supra*, and to "counterpoise the inequality by the superior justice which looks only to substance and the right, without regard to technical rules."

Appellant's arguments in regard to the exercise of discretion by the President as to the character of land to be allotted is met by the fact that the treaty dealt with timbered lands. The President by executive order selected this reservation of timber lands. Practically all other allotments of lands made to the Quinaielts is the same character (R. 42), while a great majority of the Quileutes, having equal rights, joined in the same treaty, have been refused allotments. (R. 39.) And, lastly, the President's representatives pointed out to appellee and his people the maps and locations which were suitable for agricultural purposes. (R. 34.)

The late President Roosevelt would have heartily enjoyed crossing the wilds of this reservation, as the writer has done. It cannot be expected of a President, and the President acted by and through his allotting agent, Frank Archer, and his assistant, as effectually as though done in person. The Secretary is bound by such acts officially done in the line of their duties.

Our first territorial governor, who negotiated this treay, was killed in the battle of Chantilly in the War of the Rebellion. His promises solemnly made to and relied upon by these people have not been kept. They relinquished millions of acres of the same character of land, practically all of which was heavily timbered, relying upon the faith of a solemn treaty. For sixty-eight years these hardy people have watched the tides of the Pacific and the years come and go, but the Great ather at Washington has been unmindful of the promises of the dead governor killed in action while honorably serving his country at the head of his troops.

When suit is finally brought by one of these people in a court of equity to obtain his rights, a wholly illegal, unjust makeshift of a defense is interposed.

The approval of this court should be added to the decree of the trial and appellate courts awarding appellee justice long delayed.

Respectfully submitted,

ARTHUR E. GRIFFIN,
ARTHUR R. GRIFFIN,
Attorneys for Appellee.

UNITED STATES *v.* PAYNE.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 240. Argued February 25, 1924.—Decided April 7, 1924.

1. The United States, as guardian of tribal Indians, is bound to discharge its trust with good faith and fairness, and treaties made with them should be liberally construed. P. 448.
2. The treaty made in 1855 with the Quileute and other Indians, by which they surrendered broader claims for a limited reservation, provided for money "to clear, fence, and break up a sufficient quantity of land for cultivation," and authorized the President to assign "lands" in severalty to the Indians for permanent homes. *Held*, that timbered lands were not intended to be excluded from assignment. *Id.*
3. The General Indian Allotment Act should be construed when possible in harmony with previous Indian treaties. *Id.*
4. The General Allotment Act in limiting allotments to "eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian," was not meant to preclude an allotment of timbered lands, capable of being cleared and cultivated, but simply to differentiate, in the matter of area, between lands adaptable to agricultural uses and lands valuable only for grazing purposes. P. 449.

284 Fed. 827, affirmed.

APPEAL from a decree of the Circuit Court of Appeals which affirmed a decree of the District Court for the plaintiff and appellee, Payne, in his suit to determine his right to an allotment of land in an Indian Reservation.

Mr. H. L. Underwood, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

Mr. Arthur E. Griffin, with whom *Mr. Arthur R. Griffin* was on the brief, for appellee.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Appellee, an Indian of the Quileute tribe, brought suit in the Federal District Court for the Western District of Washington to determine his right to an allotment of an eighty-acre tract of land in the Quinaielt Indian Reservation in that State. Authority for bringing the suit is found in 28 Stat. 305, c. 290, as amended by 31 Stat. 760, c. 217. The treaty with the Quileute and other Indians, made in 1855, among other things, provides for the removal and settlement of these Indians upon a reservation to be selected for them by the President, and for the payment by the United States of $2,500 "to clear, fence, and break up a sufficient quantity of land for cultivation." 12 Stat. 971, Articles 2 and 5. The President is authorized by Article 6 of the treaty, at his discretion, to cause the reserved lands to be surveyed and assign the same to individual Indians or families for permanent homes on the same terms and under the same conditions as are provided in Article 6 of the treaty with the Omahas, concluded in 1854. 10 Stat. 1043, 1044. By the General Allotment Act, as amended, it is provided:

"In all cases where any tribe or band of Indians has been or shall hereafter be located upon any reservation created for their use by treaty stipulation, Act of Congress, or executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part thereof may be advantageously utilized for agricultural or grazing purposes by such Indians, and to

cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian . . ." 24 Stat. 388, c. 119, as amended by 26 Stat. 794, c. 383, and 36 Stat. 859–860, c. 431.

The land in question was selected by Payne in 1911, after survey, through and with the approval of an allotting agent of the United States. It is of mixed character, forty or fifty acres being timbered, and the remainder being bottom land, lying along the Raft River.

The sole question we are called upon to decide is whether the land, being timbered, is to be excluded from the operation of the Allotment Act which speaks only of agricultural and grazing lands. Both courts below determined the question in the negative, 284 Fed. 827, and we agree with them. The treaty makes no restriction in respect of the character of the land to be "assigned"; and while the Allotment Act, being later, must control in case of conflict, it should be harmonized with the letter and spirit of the treaty so far as that reasonably can be done, since an intention to alter, and, *pro tanto,* abrogate, the treaty, is not to be lightly attributed to Congress. These Indians yielded whatever claims they may have had to a valuable and extensive area in exchange for a relatively small reservation, relying upon what they undoubtedly understood to be an assurance on the part of the general government that they would be given individual and permanent homes therein. They are an unlettered people, unskilled in the use of language, *Jones* v. *Meehan,* 175 U. S. 1, 10–11, with regard to whom the United States occupies the position and assumes the responsibilities of virtual guardianship, bound by every moral and equitable consideration to discharge its trust with good faith and fairness. *Choctaw Nation* v. *United States,* 119 U. S. 1, 28. Construing the treaty liberally in

favor of the rights claimed under it, as we are bound to do, *Hauenstein* v. *Lynham*, 100 U. S. 483, 487, we conclude that the character of the lands thereafter to be set apart for them severally was not restricted. The authority of the President is, broadly, to assign "lands," and that it was not meant to exclude timber lands is borne out by the provision for a payment "to *clear*, fence, and break up a sufficient quantity of land for cultivation," which may well mean to "clear" it of timber. It follows, that if the Allotment Act is now construed to exclude such lands from allotment, a materially restrictive change will have been wrought in the terms of the treaty. Such a construction is to be avoided, if possible. *Chew Heong* v. *United States*, 112 U. S. 536, 541.

It is common knowledge that vast bodies of land, originally covered with timber, in some of the public land States, including eastern Washington, have been acquired by private entry, cleared and brought under cultivation. The view that such lands were open to entry for agricultural purposes seems to have been generally recognized and acted upon (see *Johnson* v. *Bridal Veil Lumber Co.*, 24 Oreg. 182, 184–186); and, so far as we are advised, has never been questioned by the Land Department of the United States. We are, therefore, constrained to reject the rigidly literal interpretation of the Allotment Act for which the Government here contends. It is not an unreasonable view of the requirement that an allotment shall not "exceed eighty acres of agricultural or one hundred and sixty acres of grazing land" to say that it was meant not to preclude an allotment of timbered lands, capable of being cleared and cultivated, but simply to differentiate, in the matter of area, between lands which may be adapted to agricultural uses and lands valuable only for grazing purposes.

The decree of the Circuit Court of Appeals is

Affirmed.